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*Attorney Grievance Commission of Maryland v. Melissa Donnelle Gray*, Misc. Docket AG No. 56, September Term 2013; Misc. Docket AG Nos. 18 & 26, September Term 2014, filed July 27, 2015. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2015/56a13ag.pdf

ATTORNEY DISCIPLINE – DISBARMENT

**Facts**:

This matter arose from Respondent's representation of four individuals in separate divorce matters: *Pazura v. Pazura*; *Lafalaise v. Pierre*; *Garner v. Garner*; and *Antonelli v. Antonelli*. During the course of the representations, Respondent, among other things: failed to file timely responses to discovery requests, failed to file discovery requests until long after the discovery deadline in the case had elapsed, failed to prepare for court hearings, failed to return telephone calls, emails, or other communications from her clients, and failed to keep her clients informed of the status of their cases. On several occasions, Respondent failed to deposit fees obtained from the clients into an attorney trust account, as well as keep or maintain any trust account records. Respondent, despite the limited services provided and her eventual abandonment of her clients on two occasions, failed to return any of the unearned fees collected from her clients. During the course of Petitioner's investigation Respondent repeatedly failed to respond to lawful requests for information concerning the multiple client complaints received by the Office of Bar Counsel.

**Held**:

Based upon the Court's independent review of the record, the Court determined that Respondent violated, collectively, Rules 1.1, 1.2, 1.3, 1.4, 1.5(a), 1.15(c), 1.16(d), 8.1(b), 8.4(a)-(d), Maryland Rules 16-604, 16-606.1, and 16-609, and § 10-306 of the Business Occupations and Professions Article. Taking into consideration the long list of violations, Respondent's multiple violations of Rules 8.1(b), 8.4(b)-(c), and BOP § 10-306, as well as Respondent's lengthy history with the attorney disciplinary process, the Court determined that disbarment was the only appropriate sanction in this case. Notably, Respondent's willful mishandling of fees obtained from her clients called into question her integrity. Respondent did not offer any mitigating

factors to excuse her egregious conduct. Moreover, the Court noted that Respondent's failure to cooperate with Bar Counsel during the course of their investigation and to appear or otherwise participate in this matter demonstrated Respondent's apathy towards the attorney disciplinary process. The Court concluded by noting that this represented the fourth time Respondent had appeared before the Court in a disciplinary proceeding. Indeed, Respondent's disciplinary history included: a reprimand, a sixty day suspension from the practice of law, and her indefinite suspension from the practice of law.

*Attorney Grievance Commission of Maryland v. Tawana D. Shephard*, Misc. Docket AG No. 22, September Term 2014, filed August 6, 2015. Opinion by Greene, J.

McDonald, J., dissents.

http://www.mdcourts.gov/opinions/coa/2015/22a14ag.pdf

ATTORNEY DISCIPLINE – DISBARMENT

**Facts**:

Respondent, Tawana Shephard, is a lawyer barred in Virginia and the District of Columbia, but unlicensed to practice law in the state of Maryland. Respondent assumed the role of "Managing Attorney" in a Maryland law firm, operated by a nonlawyer. As "Managing Attorney," Respondent opened and managed the firm's attorney trust account, met with clients in the firm's Maryland office, signed retainer agreements, and signed letter to lenders on behalf of clients. During her tenure as "Managing Attorney," multiple client payments of unearned attorneys' fees were not deposited into the firm's attorney trust account. In addition, though Respondent signed retainer agreements promising services to clients and initial letters on behalf of clients in furtherance of those promised services, several clients' matters were either not completed or not undertaken at all.

**Held**:

Based upon the Court's independent review of the record, the Court determined that Respondent violated Maryland Lawyers' Rules of Professional Conduct 1.1, 1.2(a), 1.3, 1.4(a)(2), 1.5(a), 1.15(a), (c), and (d), 5.3, 5.5, and 8.4(d), as well as Maryland Rule 16-606.1. Under the circumstances, the Court of Appeals held that the appropriate sanction was disbarment. The Court explained that, though the facts demonstrated neither a failure to cooperate with Bar Counsel nor wilful and deliberate dishonest or deceitful behavior, it is clear that Respondent wilfully and deliberately assumed responsibilities as a "Managing Attorney" in a law firm in Maryland, met with clients in Maryland, and undertook the representation of those clients in Maryland. In doing so, she misled clients and the general public by failing to disclose the fact that she was not licensed to practice law in Maryland. Further, during Respondent's tenure as "Managing Attorney," several clients paid fees to Gilmore and did not receive the services that they were promised. In cases involving the unauthorized practice of law, one of the factors to be considered is deterrence. In this case, where the misconduct evolved from an arrangement between an unlicensed attorney and a nonlawyer, whereby the unlicensed attorney agreed to manage a law firm for the nonlawyer, and the unlicensed lawyer's ineffective management led to

the firm's deposit of unearned client fees into the firm's operating account before performing any meaningful client services, the appropriate sanction is disbarment.

*Kathy Fuller, et al. v. Republican Central Committee of Carroll County, Maryland*, No. 92, September Term 2014, filed August 21, 2015. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2015/92a14.pdf

CONSTITUTIONAL INTERPRETATION – MARYLAND CONSTITUTION –ARTICLE III, SECTION 13(a)(1) – APPOINTMENT TO FILL A VACANCY IN AN ELECTED OFFICE

**Facts**:

On December 10, 2014, the Chairman of the Republican Central Committee of Carroll County, Maryland ("Central Committee"), received notification that the incumbent Senator for District Five (within Carroll County) would be resigning from the Senate to accept a position in the administration of then-Governor Elect Lawrence J. Hogan, Jr. Section 13(a)(1) of Article III of the Maryland Constitution ("Section 13") provides that, in the case of a vacancy, "the Governor shall appoint a person to fill such vacancy from a person whose name shall be submitted to him in writing . . . by the Central Committee of the political party" in which the vacating elected official had been affiliated. Md. Const. art. III § 13(a)(1). Upon receiving that notification, the Central Committee began its process to fill the vacancy.

On January 9, 2015, the Central Committee by majority vote selected a candidate to fill the Senate vacancy. Before formally submitting the name to the Governor, however, five members of the nine-member Committee met privately with members of Governor Hogan's staff. Petitioners allege that the staff requested that the Central Committee submit three names for potential appointment to the Senate vacancy, which they did. On February 2, 2015, Petitioners (three members of the Central Committee not present at the private meeting with the Governor's staff) filed a complaint for declaratory judgment as well as injunctive and mandamus relief in the Circuit Court for Carroll County, seeking to enjoin the Governor from appointing a candidate from the three names submitted by the Committee. Petitioners accompanied their complaint with a motion for a temporary restraining order and preliminary injunction requesting similar relief. The Circuit Court denied the motion, then-Delegate Justin Ready was appointed, and immediately thereafter he resigned as a delegate and took the oath of office as a Senator for District 5.

Ready's resignation left a new vacancy in the House of Delegates to be filled. On February 9, 2015, the Central Committee announced it was accepting applications to fill the vacancy. Petitioners filed a second motion for a temporary restraining order and preliminary injunction, seeking to enjoin the Central Committee from sending the name of more than one person to fill the vacancy created by Ready's resignation. The Circuit Court denied the motion, ruling that there would be no immediate, substantial, and irreparable harm if the temporary restraining order were not to be granted, and that Petitioners were unlikely to succeed on the merits because Section 13 is "susceptible to more than one interpretation."

**Held**: Affirmed.

The Court of Appeals issued a per curiam order affirming the judgment of the Circuit Court immediately following oral argument on March 2, 2015, and in this opinion explained the reasons for that order.

The Court of Appeals held that the question whether Section 13 requires the Central Committee to submit only one name to the Governor was a justiciable question. The answer to that question does not intrude upon the Central Committee's authority and discretion, but rather requires the Court to do no more than interpret the constitutional provision.

The Court also held that Section 13 imposes a duty only on the Governor to fill a vacancy, and the use of the phrase "from a person whose name shall be submitted," does not require the Central Committee to submit only one name to the Governor. Under Section 13, the Central Committee may submit one name, multiple names, or no name at all, but the Governor must appoint from the name or names submitted by the Central Committee.

The Court held further that, in evaluating a request for interlocutory injunctive relief, the court must find the existence of all four factors as set forth in *Department of Transportation v. Armacost*, 299 Md. 392, 404-05 (1984):

> (1) the likelihood that the plaintiff will succeed on the merits; (2) the "balance of convenience" determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.

In addition to those factors, pursuant to Maryland Rule 15-504(a), the plaintiff must demonstrate that it will suffer "immediate, substantial, and irreparable harm" if the relief requested is not granted. The Court affirmed the Circuit Court's denial of the motion for injunctive relief because Petitioners failed to establish a likelihood of success on the merits given the Court's interpretation of Section 13.

*Board of Trustees, Community College of Baltimore County v. Patient First Corporation*, No. 89, September Term 2014, filed August 18, 2014. Opinion by McDonald J.

http://www.mdcourts.gov/opinions/coa/2015/89a14.pdf

INDEMNIFICATION – CONSTRUCTION OF CONTRACT PROVISION

INDEMNIFICATION – BURDENS OF PROOF

ATTORNEYS' FEES – AWARD UNDER CONTRACT – REASONABLENESS – SUFFICIENCY OF EVIDENCE

**Facts**:

Patient First Corporation ("Patient First") and the Board of Trustees of the Community College of Baltimore County ("CCBC") entered into an agreement under which Patient First allowed CCBC venipuncture students to work temporarily as phlebotomists at Patient First medical centers in the Baltimore area. The agreement contained an indemnification provision, which provided that CCBC would indemnify Patient First for any liability Patient First incurred arising from negligent acts or omissions of the CCBC students.

On January 13, 2007, a CCBC student phlebotomist at a Patient First clinic accidentally stuck herself with a needle and then attempted to draw blood from a child using the same needle. As a result of a lawsuit brought by the child's family, Patient First paid $10,000 to settle the case; CCBC's insurer contributed $40,000 on behalf of the student. Patient First sought to enforce the indemnification provision of the agreement to recover its share of the settlement payment, as well as the attorneys' fees it spent to defend the negligence action.

After a bench trial, the circuit court found that CCBC had breached the agreement by failing to indemnify Patient First and awarded Patient First the $10,000 it paid for the settlement as well as its attorneys' fees.

The Court of Special Appeals affirmed the circuit court's rulings. 219 Md. App. 69 (2014).

**Held**: Affirmed in part and vacated in part.

The circuit court properly determined that CCBC was required to indemnify Patient First for the CCBC student's negligence. CCBC had argued that Patient First itself had been negligent and that its settlement payment was attributable to its own negligence, distinct from the negligence of the student phlebotomist. The circuit court properly held that CCBC had the burden to prove its affirmative defense that Patient First was negligent in supervising the student. The circuit court

was not clearly erroneous in finding that CCBC failed to introduce sufficient proof of Patient First's negligence at trial to establish that affirmative defense.

The indemnification provision of the agreement between CCBC and Patient First also provided for the reimbursement of reasonable attorneys' fees. A circuit court has broad discretion to determine an appropriate award under such a provision. However, the evidence supporting the fee award in this case was insufficient because the description of legal services was completely redacted from the documentation submitted to the circuit court. The Court of Appeals thus vacated the award of attorneys' fees and remanded the case for further proceedings in the circuit court.

*David S. Bontempo, Individually and on Behalf of Quotient, Inc. v. Clark J. Lare, et al.*, No. 55, September Term 2014, filed August 6, 2015. Opinion by McDonald, J.

Harrell and Adkins, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/55a14.pdf

CORPORATIONS – DISSOLUTION STATUTE – OPPRESSION OF MINORITY SHAREHOLDER – REASONABLE EXPECTATIONS DOCTRINE

CORPORATIONS – DISSOLUTION STATUTE – OPPRESSION OF MINORITY SHAREHOLDER – OTHER EQUITABLE REMEDIES

CORPORATIONS – FRAUDULENT CONDUCT – PUNITIVE DAMAGES

**Facts**:

In 1999, Clark Lare and his wife, Jodi, formed an information technology staffing company called Quotient, Inc. Soon thereafter, the Lares hired David Bontempo, made him a shareholder, and executed an amended shareholders' agreement, acknowledging their respective ownership interests in the company: Mr. Bontempo 45%, Mr. Lare 4%, and Ms. Lare 51%. No employment agreement governed the terms of Mr. Bontempo's employment with Quotient. Mr. Bontempo became primarily responsible for sales and customer relations while Mr. Lare focused on operations and executive management. (Although she owned a majority of the company's stock, Jodi Lare had little involvement in the operation of the company as it grew.)

As the company's revenues grew, so did the benefits taken by the shareholders. Mr. Bontempo and the Lares paid for various personal expenses with company funds such as cars, gas, and credit card expenditures. In addition, the Lares also began paying household employees from Quotient's payroll account, using Quotient funds for personal legal fees, and advancing interest-free loans to themselves and to other companies they owned; many of these expenditures were without Mr. Bontempo's knowledge.

Although the company prospered, the relationship between Mr. Bontempo and Mr. Lare did not. In January 2010, Mr. Bontempo proposed splitting the company. Mr. Lare rejected this proposal and demanded that Mr. Bontempo sell back his stock. In March 2010, after Mr. Bontempo refused to sign a separation agreement, Mr. Lare terminated Mr. Bontempo's employment. Mr. Bontempo resigned in August 2010 as an officer and director, but continued as a shareholder.

Mr. Bontempo filed suit against Quotient and the Lares in the circuit court seeking equitable relief, personally, for shareholder oppression pursuant to Md. Code, §3-413(b)(2) of the Corporations and Associations Article ("CA"), and various remedies for Quotient through

multiple derivative claims. Quotient counter-claimed, seeking a declaratory judgment that Mr. Bontempo had been terminated for cause and that, pursuant to the shareholder agreement, he was required to sell his shares back to the company.

Under CA § 3-413, Mr. Bontempo sought an array of equitable relief, including, among other things, dissolution of Quotient, an accounting from the Lares for improper uses of Quotient's assets, and attorney's fees. The circuit court, applying the reasonable expectations test under *Edenbaum v. Schwartz-Osztreicherne*, 165 Md. App. 233 (2005), found that Mr. Lare had oppressed Mr. Bontempo as a minority shareholder. The circuit court, looking again to *Edenbaum*, declined to dissolve Quotient. Instead, it ordered a full accounting by the Lares for their misappropriations from Quotient.

Mr. Bontempo had also alleged, through a derivative claim brought on Quotient's behalf, that the Lares had breached their fiduciary duty to Quotient by using the company's assets for their personal benefit. The circuit court agreed and entered a judgment in favor of Quotient. But the circuit court did not order that the Lares reimburse Quotient for the misappropriated amounts. Instead, the circuit court treated the misappropriations as a distribution to the Lares (in an amount established by the accounting it had also ordered). The circuit court also awarded attorneys' fees to Mr. Bontempo under one of the derivative claims, pursuant to the "common fund doctrine."

In the end, the circuit court ordered Quotient to pay Mr. Bontempo (1) as a distribution to him a proportional amount compared to the sum that the Lares had misappropriated from Quotient, (2) a sum for prior unpaid distributions, and (3) an award of attorneys' fees. The circuit court did not award any other equitable or monetary relief. The circuit court rejected Quotient's counterclaim, ruling that Mr. Bontempo's termination was not for cause.

The Court of Special Appeals largely affirmed the circuit court's rulings, but vacated its judgment in part and held that the funds misappropriated by the Lares should be repaid to Quotient and that the company could then decide whether to make corresponding distributions to the shareholders, including Mr. Bontempo. The court noted that this approach would also create a "common fund" recovered on the derivative claims that would support the award of attorneys' fees made by the circuit court. 217 Md. App. 81 (2014).

**Held**: Affirmed and remanded for entry of a declaratory judgment.

Before the Court of Appeals, Mr. Bontempo argued that, even though the circuit court had found that he had no employment contract with Quotient and, accordingly, was an at-will employee, he was entitled to employment-related relief in the form of back pay and future payments for forgone salary. This argument was based upon the circuit court's application of the reasonable expectations' doctrine, in which the court had found that, at the time Mr. Mr. Bontempo became a minority shareholder in Quotient, he had an expectation of a future connection to the company as an employee, officer, and owner. The Court of Appeals rejected that argument, holding that

the circuit court had not abused its discretion in declining to award employment-related monetary relief as part of the equitable relief awarded to Mr. Bontempo under CA §3-413. The Court noted that employment-related relief was unlikely to be appropriate, unless the oppressive conduct of the controlling shareholders involved a breach of a written or oral employment agreement.

Mr. Bontempo also argued that the circuit court should have found fraudulent conduct on the part of the Lares that would entitle him (or Quotient) to punitive damages. The Court of Appeals held that neither oppressive conduct under the "reasonable expectations" test nor a breach of fiduciary duty (which the circuit court had also found on Mr. Lare's part) necessarily constituted fraud supporting an award of punitive damages. It held that the circuit court's conclusion that the Lares had not committed fraud as to Mr. Bontempo was not clearly erroneous.

Finally, the Court of Appeals noted that the declaratory judgment statute requires a court to enter a written declaratory judgment, even when the court rules on the merits against the party seeking a declaratory judgment. In this case, the circuit court ruled against Quotient on its counterclaim seeking a declaratory judgment that Mr. Bontempo had been terminated for cause, but never issued a written declaratory judgment to that effect. The Court of Appeals remanded the case with instructions to enter such a judgment.

*State of Maryland v. Peter Sutro Waine*, No. 90, September Term 2014, filed August 28, 2015. Opinion by Barbera, C.J.

Harrell and Adkins, JJ., join in judgment only.

Watts, J. dissents.

http://www.mdcourts.gov/opinions/coa/2015/90a14.pdf

COURTS – STARE DECISIS – UNGER V. STATE, 427 MD. 383 (2012)

CRIMINAL LAW – POSTCONVICTION – DISCRETION TO REOPEN POSTCONVICTION PROCEEDINGS

CRIMINAL LAW – POSTCONVICTION – WAIVER – FAILURE TO OBJECT TO ADVISORY ONLY JURY INSTRUCTIONS WILL NOT CONSTITUTE WAIVER

CRIMINAL LAW – POSTCONVICTION – CHALLENGE TO ADVISORY ONLY JURY INSTRUCTION

**Facts**:

In 1976, Respondent, Peter Sutro Waine, was tried before a jury for two counts of first degree murder and one count of larceny. At the close of evidence, the trial judge instructed the jury, pursuant to Maryland Rule 756b, that the jury is the "judge of both the law and the facts and anything that I say to you about the law is advisory only." This Rule is referred to as the advisory only jury instruction and was implemented to enforce Article 23 of the Maryland Declaration of Rights, which states that "the Jury shall be the Judges of Law." After the less than three hours of deliberation, the jury returned guilty verdicts on all counts. Waine appealed the conviction to the Court of Special Appeals, which affirmed.

Waine first petitioned for postconviction relief in 1997, claiming that the trial court erred when it issued the advisory only jury instruction. His petition was denied.

In 2007, Waine filed a motion to reopen the petition for postconviction relief. He argued that his case was analogous to *Jenkins v. Hutchinson*, 221 F.3d 679 (4th Cir. 2006), in which the Fourth Circuit held that Maryland's advisory only instructions violated federal due process because it permitted the jury to disregard the State's burden to prove the defendant guilty beyond a reasonable doubt. After the Court of Appeals' decision, *Unger v. State*, 427 Md. 383 (2012), the circuit court granted Waine's motion to reopen and found the erroneous instructions warranted a new trial. In an unreported opinion, the Court of Special Appeals agreed that Waine was entitled to postconviction relief under Unger.

The Court of Appeals granted certiorari. The State argued that *Unger* should be overruled because the Court improperly departed from stare decisis when deciding that opinion.

In *Unger*, the Court of Appeals overruled the Court's previous decisions on the advisory instruction: *Stevenson v. State*, 289 Md. 167 (1980); *Montgomery v. State*, 292 Md. 84 (1981); and *State v. Adams*, 406 Md. 240 (2008). *Unger* held that *Stevenson*, which was upheld by *Montgomery* and *Adams*, created a new State constitutional standard when interpreting Article 23 that applied retroactively. Contrary to the prior decisions, *Unger* further held that failure to timely object to the advisory instructions did not constitute waiver. In this case, the State argues that *Adams* should be reinstated as the controlling law on advisory only instructions.

**Held**: Affirmed.

The Court of Appeals upheld *Unger* under the doctrine of stare decisis. The Court reasoned that *Unger*, not *Adams*, is the decision that is subject to the principles of stare decisis and contrary to the State's contention, *Unger* was not clearly wrong; rather, the Court of Appeals in *Unger* properly applied stare decisis. Under stare decisis, deference to precedent must be respected when a new State constitutional standard has been recognized as fundamental to due process to adequately safeguard core constitutional protections.

The Court of Appeals held that the postconviction court exercised proper discretion when deciding whether to grant Waine's motion to reopen the petition by reviewing the record and the applicable law.

Lastly, the Court rejects the reasonable likelihood standard for analyzing whether the advisory only jury instructions violated a defendant's right to due process. Instead, the Court held that when instructions are clear, yet wrong, and permit the jury to disregard fundamental due process rights afforded to the defendant—such as the presumption of innocence, burden of proof, and reasonable doubt—the reviewing court must analyze whether the erroneous instruction constituted structural error. In this case, the Court held the advisory only instruction given to the jury amounted to structural error not subject to harmless error analysis, and thus, Waine was properly granted postconviction relief.

*George Varriale v. State of Maryland*, No. 85, September Term 2014, filed August 11, 2015. Opinion by Greene, J.

Harrell and Adkins, JJ., dissent.

Watts, J., joins in judgment only.

http://www.mdcourts.gov/opinions/coa/2015/85a14.pdf

CRIMINAL PROCEDURE – SEARCH AND SEIZURE – CONSENT TO SEARCH – SUBSEQUENT USE OF DNA

**Facts**:

In 2012, Petitioner George Varriale ("Petitioner" or "Varriale") voluntarily consented to a search of his person, in the form of buccal and penile swabs, for the purpose of furnishing a DNA sample to the Anne Arundel County Police Department during a rape investigation. Varriale signed a "Consent to Search Form" stating that he consented to the search of his person for "saliva" and "penile swabs," and that he understood that any evidence collected from the search could be used "in any future criminal prosecution." Although the DNA profile created from the extraction of Varriale's DNA supported the conclusion that he did not commit the alleged rape, it subsequently connected him to an earlier, unrelated burglary when Varriale's DNA profile was uploaded to the local DNA database and an automatic search revealed a match to a DNA profile created from the burglary crime scene evidence collected in 2008.

Varriale sought to suppress the DNA evidence in a subsequent prosecution for the burglary, arguing that the subsequent use of his DNA to conduct a comparison search of the DNA databank exceeded the scope of his consent and, therefore, constituted an unreasonable search in violation of his Fourth Amendment rights. After a hearing, the Circuit Court for Anne Arundel County denied Varriale's motion to suppress. Thereafter, Varriale entered a conditional guilty plea to the second degree burglary charge, reserving his right to appeal the hearing judge's ruling on his motion to suppress. The Circuit Court sentenced Varriale to four years, suspending all but time served, and placed him on two years' probation. On the same day, Varriale filed an appeal to the Court of Special Appeals. In a reported opinion, the Court of Special Appeals affirmed, holding that the subsequent examination and use of Varriale's DNA in an unrelated investigation was not a search for the purposes of the Fourth Amendment. *Varriale v. State*, 218 Md. App. 47, 54, 96 A.3d 793, 797 (2014).

**Held**: Affirmed.

The Court of Appeals held that, absent an express limitation placed on the use or storage of the DNA evidence by Varriale, the State, or by law at the time he consented to the search, it was not

unreasonable for the State to maintain and utilize Varriale's DNA for subsequent unrelated investigations. Looking at the totality of the circumstances to determine the scope of Varriale's consent, the Court of Appeals concluded that the use of Varriale's DNA was not limited to the rape investigation. It was undisputed that Varriale made no express limitation indicating that his consent was limited to or conditioned upon the DNA evidence being used exclusively in the rape investigation. In addition, nothing in the record indicated that the police gave any representation to Varriale regarding what would happen to his DNA following the analysis required for the rape investigation. Finally, the Court held that the Fourth Amendment would not apply to the subsequent use of Varriale's DNA, because an individual does not have a privacy interest in his identifying information contained in DNA, much like fingerprints, and because Varriale's failure to place an express limitation on his consent constituted a waiver of any privacy interest in his DNA that he might otherwise have retained. Therefore, the State was not prohibited from utilizing his DNA profile in subsequent criminal investigations.

*Alexander Dykes v. State of Maryland*, No. 70, September Term 2014, filed August 27, 2015. Opinion by McDonald, J.

Watts, J., concurs.

http://www.mdcourts.gov/opinions/coa/2015/70a14.pdf

CRIMINAL PROCEDURE – RIGHT TO COUNSEL – DISCHARGE OF APPOINTED COUNSEL – INHERENT POWER OF THE COURT TO APPOINT COUNSEL

**Facts**:

In November 2011, Alexander Dykes was indicted on various burglary and theft charges. Over the course of the following 17 months, Mr. Dykes appeared at approximately 10 pre-trial hearings before six different judges. Throughout these hearings, he expressed his interest in being represented by counsel, his distrust of his assigned counsel and of the Office of the Public Defender ("OPD") generally, a desire to discharge counsel, and resignation at being represented by the OPD or at having to represent himself.

After making and withdrawing earlier motions to fire his assigned assistant public defender, Mr. Dykes' latest motion to fire his assigned public defender was the subject of a hearing on March 27, 2013. He claimed that the OPD fabricated evidence and lied to him. The court granted this motion, and importantly, the court found that Mr. Dykes had a "meritorious" reason to discharge counsel. The court did not appoint substitute counsel, despite Mr. Dykes' requests for counsel. On April 16, 2013, Mr. Dykes filed a motion for court-appointed counsel, but the administrative judge responded that the court did not have the power to assign another public defender. On May 1, 2013, immediately preceding his trial, Mr. Dykes renewed his request for court-appointed counsel with the trial judge, but the court denied his request explaining that he had a choice only between the OPD and self-representation.

Mr. Dykes was convicted of first degree burglary and malicious destruction of property valued at less than $500. He appealed his conviction to the Court of Special Appeals, which affirmed the convictions in an unreported opinion.

**Held**: Reversed.

The Court of Appeals concluded that, under Maryland Rule 4-215(e), a court must give a defendant an opportunity to retain new counsel when he discharges his former counsel for a meritorious reason. In the case of a defendant who can afford a private attorney, the opportunity to retain new counsel generally means allowing the defendant time to find and hire a new attorney. In the case of an indigent defendant, if there is a meritorious reason for the discharge

of appointed counsel, the trial court must exercise its inherent authority to appoint new counsel if the public defender declines to represent the defendant.

Applying these holdings to Mr. Dykes' case, the Court held that, after finding a meritorious reason for discharge, the circuit court should have referred Mr. Dykes to the OPD for the assignment of a new public defender or appointed counsel pursuant to its inherent authority.

*State of Maryland v. William Westray*, No. 74, September Term 2014, filed August 27, 2015. Per Curiam Opinion.

http://www.mdcourts.gov/opinions/coa/2015/74a14.pdf

CRIMINAL PROCEDURE – RIGHT TO COUNSEL – DISCHARGE OF COUNSEL – APPOINTMENT OF COUNSEL FOLLOWING DISCHARGE OF PRIOR APPOINTED COUNSEL

**Facts**:

In March 2012, William Westray was indicted on various burglary and theft charges. In a series of pre-trial motions, Mr. Westray expressed his dissatisfaction with his assigned assistant public defender, said that he would rather represent himself than be represented by the assistant public defender, and informed the circuit court that he wished to hire a private attorney. The circuit court advised Mr. Westray in some detail of his right to counsel and the advisability of having counsel. The assistant public defender advised the court that he had no doubt that Mr. Westray was competent and acting voluntarily. At the conclusion of a hearing on June 8, 2012, the circuit court granted Mr. Westray's motion to discharge his assistant public defender, but it found that Mr. Westray's reasons for discharging his counsel were without merit. However, the circuit court did not make an explicit finding on the record that Mr. Westray knowingly and voluntarily waived his right to counsel.

On August 1, 2012, three weeks before the trial date, Mr. Westray filed a motion for the appointment of *pro bono* counsel, explaining that he was unable financially to retain private counsel. At the ensuing hearing, the trial judge denied the motion and stated that he was unsure whether he even had the authority to appoint a *pro bono* lawyer.

Mr. Westray represented himself at trial and was convicted on 21 of the 22 counts. He appealed his conviction to the Court of Special Appeals, which reversed and held that the trial court failed to comply with the requirement of Maryland Rule 4-215(b) that the court determine and announce on the record that the defendant knowingly and voluntarily waived counsel. In dicta, the Court of Special Appeals held that the trial court did not abuse its discretion when it declined to appoint substitute counsel.

**Held**: Reversed.

The Court of Appeals concluded that a criminal defendant must make a contemporaneous objection to a trial court's failure to determine and announce on the record that a defendant waived his right to counsel pursuant to Maryland Rule 4-215(b) in order to preserve the issue for appeal. While the Court recognized that it may be unfair to require a lay defendant, who acts pro

se, to make a contemporaneous objection, the Court pointed out that Mr. Westray was represented by counsel when he failed to make an objection. The Court noted that the assistant public defender was not discharged until the end of the June 8, 2012 hearing, and therefore, Mr. Westray was represented by counsel at the time that the trial court arguably failed to comply with the "determine and announce" requirement.

The Court also opined that a trial court has inherent authority to appoint counsel as necessary to perform its constitutional function. The Court explained that a trial court may need to invoke this authority when the Office of the Public Defender is unavailable to represent an indigent defendant who has a constitutional right to the appointment of counsel furnished by the State. However, the Court clarified that a trial court has no obligation to appoint counsel pursuant to its inherent authority when it finds that an indigent defendant lacks good cause to discharge his previously assigned counsel.

*Shyquille Griffin v. Andrew Lindsey, et al.*, No. 88, September Term 2014, filed August 4, 2015. Opinion by Adkins, J.

Greene and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/88a14.pdf

MARYLAND CODE (2001, 2008 REPL. VOL.), § 11-103(b) OF THE CRIMINAL PROCEDURE ARTICLE ("CP") – VICTIM'S RIGHT TO APPEAL – STATUTORY CONSTRUCTION

**Facts**:

In May 2011, Petitioner, Shyquille Griffin, and Antonio Whitely arranged to purchase marijuana from Respondent, Andrew Lindsey. When the three met to consummate the transaction, Whitely was dissatisfied with the quantity of marijuana that Lindsey provided. Consequently, Griffin and Whitely attempted to rob Lindsey, and when Lindsey fled in his car, Whitely shot him in the arm.

Griffin and Whitely were indicted in June 2011 on various charges related to the shooting. On November 30, 2011, Griffin entered a plea agreement (the "Agreement") with the State. The Agreement provided that if Griffin provided truthful testimony in the State's case against Whitely, the State would agree to a guilty plea for attempted robbery and a sentencing cap of 15 years, suspending all but 18 months. The Agreement did not mention restitution.

At a plea hearing conducted on December 16, 2011, the parties presented the Agreement to the Circuit Court for Prince George's County. The hearing judge accepted the terms of the Agreement and postponed sentencing until January 2012.

After satisfying the terms of the Agreement, Griffin returned to court on January 13, 2012 for sentencing under the plea agreement. Acknowledging that the Agreement did not provide for restitution, the State nevertheless advised the court that Lindsey was seeking $9,700 in restitution. The hearing court denied the request, concluding that it could not order restitution because it would violate the Agreement by adding to the penalty.

Invoking Maryland Code (2001, 2008 Repl. Vol., 2011 Supp.), § 11-103(b) of the Criminal Procedure Article ("CP") and arguing that the hearing court improperly denied his request for restitution, Lindsey filed a timely "Motion for Reconsideration of Restitution and Request for Hearing" ("CP § 11-103(e) Motion") on February 13, 2012. The Circuit Court denied the CP § 11-103(e) Motion on March 7, 2012, reiterating that ordering restitution would violate the Agreement.

Lindsey filed an "Application for Leave to Appeal to the Court of Special Appeals" ("Application") on April 5, 2012, which was granted. The intermediate appellate court reversed

the Circuit Court, holding that although the Application was untimely with respect to the Circuit Court's January 13, 2012 sentencing judgment, the Application was timely with respect to the Circuit Court's March 7, 2012 order denying Lindsey's CP § 11-103(e) Motion. Griffin filed a Petition for Writ of Certiorari, which we granted to consider whether crime victims lack statutory authority to appeal from the denial of a CP § 11-103(e) Motion, thus depriving the Court of Special Appeals of jurisdiction.

**Held**: Reversed.

Griffin and Lindsey offered competing interpretations of CP § 11-103(b). Griffin argued that because the reconsideration provision did not appear in CP § 11-103(b), Lindsey did not have a right to file an application for leave to appeal the denial of his CP § 11-103(e) Motion. Lindsey countered that although the reconsideration provision was absent from CP § 11-103(b), a CP § 11-103(e) motion was, at its heart, nothing more than a mechanism for asking a court to review its earlier determination under CP § 11-603—the "restitution provision." In other words, the restitution provision was embodied in a CP § 11-103(e) motion. Thus, Lindsey contended, because the restitution provision appeared in CP § 11-103(b), he had a right to file an application for leave to appeal the denial of his CP § 11-103(e) Motion.

Beginning with the plain meaning of the language of CP § 11-103(b), the Court observed that the reconsideration provision was clearly absent. This was significant because the Court recognizes the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). The Court discussed several cases in which it applied this doctrine to hold that when a certain element is not expressly stated in the language of a statute or Maryland Rule, the statute or Rule is unambiguous and does not include that element.

Regarding Lindsey's argument that the Court should consider a CP § 11-103(e) motion to be synonymous with an original request for restitution under CP § 11-603, the Court emphasized that he cited no case to support this assertion. The Court's independent research, likewise, revealed no such case. Thus, the Court concluded Lindsey could not overcome the exclusion of the reconsideration provision in CP § 11-103(b) by relying on the inclusion of the restitution provision in CP § 11-103(b).

The Court then explained that not only did Lindsey's argument defy the unambiguous language of CP § 11-103(b), but it also contradicted the Court's reasoning in *Chmurny v. State*, 392 Md. 159, 896 A.2d 354 (2006). In that case, the Court held that the defendant's appeal was untimely, reasoning that the defendant failed to file it within 30 days of a final judgment and "one cannot allow the time for noting an appeal from [a final, appealable] judgment to lapse and escape the jurisdictional bar by filing another, identical motion or a *motion to reconsider* the earlier ruling months or years later and then appealing the denial of that second motion." Id. at 166, 896 A.2d at 358 (emphasis added). Applying this reasoning, the Court concluded that Lindsey had 30 days to file an appeal from the January 13, 2012 sentencing judgment. Like the defendant in

*Chmurny*, however, Lindsey allowed the time for noting an appeal to lapse, and he could not cure this jurisdictional defect by appealing the denial of a subsequent motion for reconsideration.

Finally, the Court explained that Lindsey's argument further failed because accepting it would undermine the rule that the Court must narrowly construe statutes granting the right to appeal. Holding that a victim could appeal not only from the denial of or failure to consider a right secured by the 12 statutes enumerated in CP § 11-103(b), but also from a motion to reconsider the denial of or failure to consider these rights, would considerably increase victims' appellate rights. The Court stated that such a construction was anything but narrow and had to be rejected.

*State Department of Assessments and Taxation v. Kevin Andrecs*, No. 50, September Term 2014, filed August 21, 2015. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2015/50a14.pdf

TAXATION – PROPERTY TAX – PRINCIPLE OF UNIFORMITY – HOMESTEAD TAX CREDIT – CALCULATION OF CREDIT WHEN RESIDENCE IS RAZED AND REPLACED

**Facts**:

Kevin Andrecs and his wife had lived in their home in Anne Arundel County from August 1999 until August 2008 when they undertook a renovation project of the property. They razed the existing house and constructed a new house. During this time, Mr. Andrecs and his family did not reside on the property. Mr. Andrecs and his family moved into the new home in December 2009.

In April 2011, the State Department of Assessments and Taxation ("SDAT") completed a revaluation assessment of the Andrecs property as a result of the renovations. In September 2011, SDAT provided Mr. Andrecs with a notice of the taxable assessment of his property for the 2011–2012 tax year, which indicated that he would continue to receive a homestead tax credit but that the taxable portion of the assessment would include the value of the renovations. Mr. Andrecs believed that he was entitled to a larger homestead tax credit and contested the SDAT's calculation of the credit. He unsuccessfully appealed the notice of assessment both to the SDAT in a written appeal and then to the Property Tax Assessment Appeals Board for Anne Arundel County. Mr. Andrecs next appealed the SDAT's calculation of the homestead tax credit to the Maryland Tax Court. That agency determined that the SDAT calculated the homestead tax credit correctly.

Mr. Andrecs then filed a petition for judicial review in the Circuit Court for Anne Arundel County. That court reversed the decision of the Maryland Tax Court. The SDAT appealed the circuit court's decision to the Court of Special Appeals, which affirmed the judgment in an unreported decision.

**Held**: Reversed.

The Court of Appeals concluded that the computations approved by the Maryland Tax Court mirrored the computations required by the homestead tax credit statute. Article 15 of the Maryland Declaration of Rights requires uniformity in assessments and taxation. Mindful of this principle, the Court explained that TP §9-105(e) – the calculation provision of the homestead property tax credit – must be read in conjunction with TP §9-105(c)(5) – which governs the tax credit when a homeowner razes and rebuilds a home – to compute the tax credit properly. TP

§9-105(c)(5) both preserves the tax credit for a homeowner who renovates his property while living in another location, and provides directions for how the tax credit should be calculated following the completion of the renovations.

The Court explained that TP §9-105(c)(5)(iii) provides that a homeowner should receive the full value of the credit during the years that the homeowner would otherwise be ineligible but it also precludes the computation from resulting in an assessment below zero. The Court further explained that TP §9-105(c)(5)(iv) makes clear that the calculation of the credit associated with the taxable assessment of the property must include the revaluation of the improvements under TP §8-104(c)(1)(iii) The Court noted that these conditions ensure that the value of renovations made by a taxpayer would not be unfairly shielded from taxation.

Turning to TP §9-105(e), the Court explained that the calculation of the homestead tax credit follows a three-step process. The first-step is to multiply the prior year's taxable assessment by the applicable homestead credit percentage. The Court noted that the statute defines "taxable assessment" in TP §9-105(a)(9) as the revalued assessment minus the assessment on which a property tax credit is authorized. The Court explained that the TP §9-105(c)(5)(ii) provides the taxpayer with the full benefit of the credit existing at the commencement of the year when the property was razed. The Court concluded that collectively these provisions mean that the taxable assessment for a homeowner who razes his property is the revalued assessment minus the assessment on which the tax credits were based prior to the razing. The Court then explained that the taxable assessment is then multiplied by the applicable homestead credit percentage to complete step one.

Moving to step two of the calculations under TP §9-105(e), the Court explained that the figure derived in step one is subtracted from the current year's assessment. This step provides the assessment on which the tax credit is based for the current tax year. In the third step, the Court explained that the figure from step two is multiplied by the applicable property tax rates for the pertinent year. The end result is the amount of the homestead tax credit, which is subtracted from the tax that would otherwise be due to yield the tax levy, exclusive of any other applicable credits.

The Court concluded that the Tax Court's calculation was correct. The Court held that, while SDAT purported to compute the credit relying on TP §9-105(c)(5) alone, the calculations mirrored the process required by the statute. The Court determined that Mr. Andrecs' approach misapplied the statute because his approach both ignored the definition of "taxable assessment" under TP §9-105(a)(9) and failed to include the revaluation assessment in step one. Furthermore, the Court noted that Mr. Andrecs' approach would yield results inconsistent with the constitutional uniformity principle.

*County Council of Prince George's County, Sitting as the District Council v. Zimmer Development Company*, No. 64, September Term 2014, filed August 20, 2015. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2015/64a14.pdf

ZONING AND LAND USE – REGIONAL DISTRICT ACT – DISTRICT COUNCIL REVIEW OF PLANNING BOARD DECISION – SUBSTANTIAL EVIDENCE

ZONING AND LAND USE – REGIONAL DISTRICT ACT – DISTRICT COUNCIL REVIEW OF PLANNING BOARD DECISION – LIMITED TO ISSUES ON REMAND

ADMINISTRATIVE LAW – JUDICIAL REVIEW OF DISTRICT COUNCIL DECISION – REVERSAL OF AGENCY DECISION

**Facts**:

Zimmer Development Company ("Zimmer") seeks to construct a small two-tenant retail center (with a CVS as the primary tenant) on a triangular 4.14 acre parcel in Adelphi, an unincorporated community in Prince George's County. The property is bounded by three roads, and is currently unimproved.

In 2004, the property was rezoned from R-R (Rural Residential), a Euclidian zone which would not allow the proposed development, to L-A-C (Local Activity Center), a floating zone which allows commercial retail uses. Exercising its conditional zoning authority, the County Council of Prince George's County, sitting as the District Council, imposed several conditions on the rezoning.

On 14 March 2011, as part of the post-rezoning development process for the

L-A-C zone, Zimmer submitted concurrently to the Prince George's County Planning Board a Comprehensive Design Plan ("CDP-1001") and a Specific Design Plan

("SDP-1001") regarding on-site and off-site details of the proposed development. The Planning Board approved the submissions, subject to an extensive set of conditions. The District Council elected to review the Planning Board's decision, pursuant to Prince George's County Code §§ 27-523(a) and 27-528.01(b). After holding a public hearing, the District Council remanded the CDP and SDP to the Planning Board, pointing to three specific concerns regarding Zimmer's submissions, as approved by the Board. On 9 February 2012, after reconsidering Zimmer's application in response to the remand issues identified by the District Council, the Planning Board amended the conditions of its approval, further explained its conclusions, and again approved CDP-1001 and SDP-1001.

The District Council elected again to review the Planning Board's approval of the CDP and SDP. At the end of a public hearing and succinct oral arguments regarding CDP-1001 and SDP-1001, the District Council voted unanimously to deny Zimmer's submissions. The District Council's staff produced an Order of Denial and an attached memorandum containing reasons for the denial. The memorandum presented 14 reasons purporting to justify the denial. The District Council, on 21 June 2012, adopted as its own the Order of Denial and attached memorandum.

Zimmer petitioned the Circuit Court for Prince George's County for judicial review of the District Council's reversal of the Planning Board's approval. The trial court held, among other things, that: (1) the District Council's review was limited to whether the Planning Board's decision was arbitrary, capricious, or illegal; (2) the District Council's review was limited further to the issues it had remanded to the Planning Board; and (3), because there was substantial evidence supporting the Planning Board's approval of Zimmer's CDP and SDP, the District Council substituted improperly its judgment for the judgment of the Planning Board. The Circuit Court reversed the decision of the District Council and remanded the case to the District Council with an order directing the District Council to approve Zimmer's CDP and SDP in accordance with the Planning Board decision. The Court of Special Appeals affirmed the judgment of the Circuit Court. *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 217 Md. App. 310, 331, 92 A.3d 601, 614 (2014).

The District Council petitioned for a writ of certiorari. The Court granted certiorari to consider several questions, which, upon further consideration, were condensed to three:

(1) Did the District Council have broad, original jurisdiction when considering the Planning Board's approvals of CDP-1001 and SDP-1001, or did it have only a more limited, appellate-like jurisdiction?

(2) Was the District Council's ultimate consideration of the Planning Board's approvals limited to the issues remanded to the Planning Board?

(3) Assuming the District Council reviewed the Planning Board's decision using an improper standard, should the case have been remanded to the District Council to apply the correct standard?

**Held**:

(1) The District Council possessed only appellate jurisdiction to review the Planning Board's decisions regarding CDP-1001 and SDP-1001, and was authorized to reverse the decision of the Planning Board only if the Board's decision was not supported by substantial evidence, was arbitrary, capricious, or illegal otherwise; (2) the District Council was not authorized, after electing to review on its own initiative the Planning Board's decisions regarding CDP-1001 and SDP-1001 for a second time, to consider issues other than those remanded to the Planning Board on 7 November 2011; and (3) the Circuit Court's order reversing the decision of the District

Council denying CDP-1001 and SDP-1001 and ordering the District Council to affirm the decision of the Planning Board was appropriate on the record of this case.

# COURT OF SPECIAL APPEALS

*100 Harborview Drive Condominium Council of Unit Owners and Zalco Realty, Inc. v. Paul C. Clark*, No. 2175, September Term 2013, filed July 30, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/2175s13.pdf

CIVIL PROCEDURE – ATTORNEY CLIENT PRIVILEGE – WORK PRODUCT DOCTRINE

REAL PROPERTY – MARYLAND CONDOMINIUM ACT

**Facts**:

In 2009, Appellee/Cross-Appellant Dr. Paul C. Clark purchased condominium unit Penthouse 4A in the 100 Harborview Drive Condominium Building. After continued water leaks caused problems in the unit, Dr. Clark filed a multitude of complaints. With both administrative and court actions pending, Dr. Clark sought to examine the records maintained by Appellants/Cross-Appellees 100 Harborview Drive Condominium Council of Unit Owners ("Harborview" or "the Council") and property manager Zalco Realty, Inc. ("Zalco")—including the detailed billing reports and written legal advice of Harborview's counsel.

On January 16, 2013, Dr. Clark, filed a three-count complaint in the Circuit Court for Baltimore City against Harborview and Zalco, alleging that pursuant to the Maryland Condominium Act ("MCA"), Maryland Code (1974, 2010 Repl. Vol.) Real Property Article ("RP") §§ 11-*101 et seq*. and Article X of the By-laws of 100 Harborview Drive Condominium, Dr. Clark was entitled to examine and copy "(a) detailed billing reports or supporting documentation for [Harborview]'s legal invoices concerning Dr. Clark, his family, and the Unit; (b) written advice of legal counsel concerning Dr. Clark, his family, and the Unit; and (c) e-mails between [Harborview] and Zalco concerning the financial well-being of the Condominium." In Count I, Dr. Clark sought a permanent injunction directing Harborview and Zalco to produce the documents; in Count II, he requested specific performance on his request to inspect the documents; and in Count III, he demanded damages for failure to provide the requested documents. On March 5, 2013, Harborview and Zalco filed an answer and a counter-complaint seeking a declaratory judgment that Dr. Clark was not entitled to inspect the detailed billing reports and written advice of counsel.

Following a two-day bench trial, the circuit court rendered its decisions on October 16, 2013. The court decided, among other things, to deny Dr. Clark's request to inspect the written advice

of Harborview's counsel, but entered a permanent injunction enjoining Harborview and Zalco from denying Dr. Clark's request to inspect and copy legal invoices and billing records concerning Dr. Clark, his family, and the Unit. The Court also enjoined Harborview and Zalco from refusing to provide Dr. Clark any future e-mails between Harborview and Zalco concerning the financial well-being of Harborview, and required that they comply with any future request by Dr. Clark for e-mails concerning the financial well-being of Harborview. Both Parties appealed from the judgments of the circuit court.

**Held**: Affirmed in part; vacated in part.

The Court of Special Appeals began by examining RP § 11-116 and determined that the plain language of the statute allows Dr. Clark to request access to the written advice of counsel, as well as the billing records of counsel, so long as he and/or his unit are "the subject of the record." However, the Court also found it clear that these records would normally be subject to the attorney-client privilege and work product doctrine, especially where, as here, Dr. Clark and Harborview are adverse parties in ongoing litigation. Accordingly, the Court examined whether the exception to the exception to disclosure contained in RP § 11-116(c)(3) abrogates the attorney-client privilege and work product doctrine.

The Court determined that RP § 11-116 contains no specific words of repeal or abrogation; does not directly conflict with the common law attorney-client privilege such that the two cannot co-exist; and neither invalidates nor supplants the entire subject matter of attorney-client privilege or work product doctrine. Examining the legislative history of the document inspection provisions applicable to Maryland condominiums and common ownership communities, the Court of Special Appeals concluded that the General Assembly had evinced the intention to provide the information necessary to property owners so that they might assess and protect their investments, while simultaneously recognizing the importance of protecting certain documents from unnecessary disclosure.

Having determined that the attorney-client privilege and work product doctrine may protect documents from disclosure even in the context of an RP § 11-116 request, the Court of Special Appeals next looked to whether Harborview had met its burden to establish that the privilege and/or doctrine were applicable to the requested documents. The Court held that Harborview failed to meet its burden regarding the detailed billing reports. However, regarding the written advice of counsel the court stated:

> We can envision no more fundamental an example of a confidential communication between an attorney and client than written legal advice transmitted from the attorney directly to the client. . . .[W]e observe that especially where a condominium unit owner seeking the production of the written advice of legal counsel is engaged in ongoing litigation against the condominium's governing association, "the pursuit of truth and justice" does not compel the production of otherwise privileged material.

Turning to the ancillary matters, the Court of Special Appeals found no error in the exclusion of Harborview's proffered expert testimony. The Court did, however, vacate the order enjoining Harborview and Zalco from refusing to produce future e-mail correspondence, as it was not based on any showing of a likelihood of future irreparable harm.

*James William Fox, II v. Fidelity First Home Mortgage Company*, No. 1024, September Term 2013, filed July 1, 2015. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2015/1024s13.pdf

BANKRUPTCY – DISCHARGEABILITY OF DEBT – CONCURRENT JURISDICTION – LAW OF THE FORUM – MD. RULE 2-311(f) – INDEMNIFICATION

**Facts**:

James William Fox, II, appellant, who was employed as a loan officer with Fidelity First Home Mortgage Company ("Fidelity First"), appellee, initiated a fraudulent foreclosure rescue scheme. One of the victims, Charlene Williams, sued Fidelity First, which was found liable under a theory of *respondeat superior* and ordered to pay damages.

Fidelity First then filed a complaint in the Circuit Court for Prince George's County against Mr. Fox and another individual, seeking indemnification. It alleged that "the fraudulent mortgage rescue scheme scam" perpetrated by Mr. Fox was within the scope of his employment with Fidelity First, and Mr. Fox and the other individual were "solely responsible to Fidelity First for any and all damages imposed by the jury on Fidelity First or, in the alternative, are joint tortfeasors." Mr. Fox argued that the claims for indemnification and contribution were discharged in bankruptcy.

Fidelity First filed a motion for summary judgment, asserting that "[a]ny damages it owes to Ms. Williams resulted solely from the active and primary negligence of Fox. Mr. Fox did not file an opposition to Fidelity First's motion for summary judgment. Instead, he filed in the United States Bankruptcy Court for the District of Maryland a motion to reopen a Chapter 7 voluntary bankruptcy case that he originally filed on January 16, 2009. Mr. Fox asserted that, pursuant to 11 U.S.C. § 524(a)(2) of the Bankruptcy Code, a discharge under § 727 of the Bankruptcy Code "'operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not the discharge of such debt is waived.'" He sought to include Fidelity First as a creditor, as the events giving rise to Fidelity First's claim for indemnification and contribution occurred prior to his original bankruptcy petition date. He conceded that "Fidelity First was not scheduled as a creditor" in the bankruptcy case "because it[s] claims were not asserted until well after" the bankruptcy case was closed. Furthermore, as the "Chapter 7 Trustee reported this as a 'no asset' case . . . the claims of unscheduled creditors," including Fidelity First, "were discharged." Thus, he sought to reopen the case to "add Fidelity First as a creditor, and to enforce the discharge injunction." The circuit court stayed the proceedings pending a decision from the Bankruptcy Court.

The Bankruptcy Court issued a memorandum order denying Mr. Fox's motion to reopen his Chapter 7 case to add Fidelity First as a creditor, finding that "[n]o ground exists to reopen" the

case, and stating that if Fidelity First's claim arose from fraud, misrepresentations, willful or malicious injury, as set forth in 11 U.S.C. § 523(a)(2), (4), or (6), the claim may not have been discharged. The Bankruptcy Court stated that Mr. Fox could raise the issue of discharge in state court as a potential defense to litigation, and the state court could determine whether Mr. Fox's discharge applied to Fidelity First's claim. Accordingly, the Bankruptcy Court determined that it was not necessary to reopen the case, and it denied Mr. Fox's motion.

Subsequently, the circuit court lifted the stay and gave Mr. Fox 18 days to respond to the motion for summary judgment. Mr. Fox filed a "Response To Order Lifting Stay And Motion For Summary Judgment; And Notice of Discharge, Discharge Order, And Discharge Injunction." In his response, he asserted that the circuit court was required to make a determination of whether Fidelity First's claims were excepted from discharge under Section 523(a)(2), (4) or (6) of the Bankruptcy Code, and that Fidelity First was required to commence an adversary proceeding, subject to the Bankruptcy Rules, to determine dischargeability of the debt. He did not request a hearing.

The circuit court granted summary judgment in favor of Fidelity First. It found that, because the claim against Mr. Fox was based on fraud, it was nondischargeable in bankruptcy. Accordingly, it ordered judgment in favor of Fidelity First and against Mr. Fox and another employee for indemnification and contribution in the amount of $340,583.98, plus costs.

On appeal, Mr. Fox argued that the court erred when it granted summary judgment in favor of Fidelity First because the proper procedure was not followed to determine whether Fidelity First's claim was nondischargeable under 11 U.S.C. § 523(a) of the Bankruptcy Code. He asserted that Fidelity First failed to file, as required, a complaint or a motion "seeking to identify which exception from discharge it believed applied to this case," and the court failed to make a determination, after a hearing, that Fidelity First's claim was nondischargeable.

**Held**: Affirmed.

The determination whether an intentional tort debt has been discharged in bankruptcy generally is within the exclusive jurisdiction of the bankruptcy court. Because Mr. Fox did not schedule Fidelity First as a creditor in his bankruptcy case, however, the circuit court had concurrent jurisdiction to construe the discharge and determine whether the particular debt at issue was within the discharge.

When the judicial determination of dischargeability is in the state court as an affirmative defense, the procedure to be followed is governed by Maryland law. There is no procedural provision in Maryland law that requires a creditor to file a separate complaint in response to a debtor asserting the affirmative defense of discharge of debt. Nor is there a requirement for the court to hold a hearing on this issue prior to rendering its decision when no hearing was requested.

Section 523(a)(2) of the Bankruptcy Code provides that a discharge pursuant to § 727 "does not discharge an individual debtor from any debt . . . (2) for money, property, services . . . obtained

by . . . false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." The circuit court properly found that, because the case "includes a claim for fraud, it is non-dischargeable."

The issue before the circuit court was whether the debt was nondischargeable because it was "of a kind specified in" 11 U.S.C. § 523(a)(2), (4) or (6), encompassing claims arising out of: (1) "actual fraud, false pretenses or false representations" ((a)(2)); (2) "fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny" ((a)(4)); and (3) "willful or malicious injury to person or property" ((a)(6)). *In re Candidus*, 327 B.R. at 116. These debts sometimes are referred to as "intentional tort debts." *Id*. Where the underlying lawsuit is for indemnification, the indemnitors claim may be covered by the fraud exception. Mr. Fox obtained money by fraud and Fidelity First's liability arose from that fraud. Even though Fidelity First was not the target of Mr. Fox's fraud, pursuant to § 523(a)(2), Mr. Fox is not entitled to discharge of the debt that was incurred due to his fraud.

*Cindy L. Schlotzhauer v. Kevin Morton, Jr., et al.*, No. 49, September Term 2014, filed July 30, 2015. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2015/0049s14.pdf

CIVIL PROCEDURE – REAL PARTY IN INTEREST – BANKRUPTCY TRUSTEE

MOTION TO ALTER OR AMEND JUDGMENT – DISCRETION OF COURT

**Facts**:

Cindy Schlotzhauer was injured when her automobile collided with a vehicle driven by Kevin Morton. A few months later, Schlotzhauer filed for Chapter 7 bankruptcy. In her bankruptcy filings, she failed to list any potential claim arising from the automobile accident as an exempt asset. She was then discharged from bankruptcy.

Shortly before the expiration of the three-year statute of limitations, Schlotzhauer commenced a personal injury action in the Circuit Court for Queen Anne's County against Morton and his employer Uni-Select. The defendants moved for summary judgment on the ground that Schlotzhauer was not the property to assert her claims because the unscheduled personal injury claim remained property of her dormant bankruptcy estate.

In response, Schlotzhauer made every effort to cure the defect. In bankruptcy court, she reopened the Chapter 7 case, filed amended schedules to disclose the tort claim, and received confirmation that the personal injury claim was exempt from the bankruptcy estate. Meanwhile, she asked the circuit court to defer its ruling until the bankruptcy court determined the status of her exemption, or in the alternative to permit the bankruptcy trustee to be joined as a co-plaintiff.

On the same day that the bankruptcy court determined that the personal injury claim was exempt from the bankruptcy estate, the circuit court entered summary judgment in favor of the defendants. The court reasoned that the tort claim still belonged to the bankruptcy estate. Schlotzhauer immediately notified the circuit court that the bankruptcy court had reached the opposite conclusion on that question of federal bankruptcy law. She then obtained a ruling to clarify that the ownership of the claim revested in her, by operation of federal bankruptcy law, *nunc pro tunc* as of the date she had originally petitioned for bankruptcy.

When Schlotzhauer moved to alter or amend the court's judgment, the circuit court held a new hearing to consider the effect of the final determinations of the bankruptcy court. The circuit court refused to vacate its judgment. Schlotzhauer then filed a timely appeal.

**Held**: Vacated and remanded.

Maryland Rule 2-201 requires that every action shall be prosecuted in the name of the real party in interest. The plaintiff in this case filed a timely complaint, but she was not the real party in interest when she filed her complaint. Instead, her bankruptcy trustee was the proper party to assert that personal injury claim. Because Schlotzhauer had failed to disclose the tort claim to her creditors when she filed for Chapter 7 bankruptcy, the claim remained property of the bankruptcy estate even after the case initially closed.

Although Schlotzhauer was not the real party in interest at the time her tort action was filed, she became the real party in interest during the pendency of the personal injury action. She did so by reopening the bankruptcy case, disclosing the tort claim to her trustee and creditors, and obtaining confirmation that the personal injury claim was exempt from the bankruptcy estate. As a result, Schlotzhauer was the sole owner of the tort claim on the date that the circuit court granted summary judgment against her. The circuit court erred in finding that the bankruptcy court had "not taken any action" yet and that the cause of action "currently" belonged to the bankruptcy estate. Unbeknownst to the circuit court, the bankruptcy court had already determined, as a matter of federal bankruptcy law, that the claim "belonged and belongs" to the plaintiff.

Even though Schlotzhauer filed suit before she reacquired the right to assert her claim, she could still maintain the action once she reacquired ownership of the claim. When ownership of the claim revested in her, she became the real party in interest during the pendency of the action. She was not required to commence an entirely new action that would have been barred by the statute of limitations.

When the plaintiff replaced the bankruptcy trustee as the real party in interest, her rights related back to the commencement of the lawsuit within the statute of limitations. Under the doctrine of relation-back, the joinder or substitution of the real party in interest has the same effect as if the action had been commenced in the name of the real party in interest. The governing principles are the same when a party accedes to status as the real party in interest during the pendency of a lawsuit.

Further, as a matter of federal bankruptcy law, Schlotzhauer is now deemed to have owned the claim continuously at all times. If any question remained as to Schlotzhauer's ability to assert her claims, the bankruptcy court put it to rest when it ruled that, by operation of federal bankruptcy law, the revesting of ownership of the claim related back to the filing of her bankruptcy petition.

The bankruptcy court's final determination on the party's rights under federal bankruptcy law directly refuted the central premise of the circuit court's judgment. The circuit court, however, did not learn of the bankruptcy court's determinations until after it had already granted summary judgment in favor of the defendants. Schlotzhauer promptly informed the court of those material developments in a timely motion to alter or amend.

The court has broad discretion whether to grant motions to alter or amend filed within 10 days after the entry of judgment. When a party makes a prompt and timely request that the court

reconsider a ruling because of a material development that the party could not have raised before the court ruled, the court can and should reconsider its decision. Although the circuit court properly exercised its discretion to consider the undisputed evidence of the new developments, the court then reached an erroneous conclusion in denying the motion. The court's ultimate exercise of discretion on the motion is always tempered by the requirement that the court correctly apply the law applicable to the case. The court should have vacated its judgment when it was shown that the grounds for the judgment were untenable.

*Kimberly Johnson v. State of Maryland*, No. 158, September Term 2014, filed May 28, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/0158s14.pdf

CRIMINAL LAW – INVOLUNTARY MANSLAUGHTER – SECOND DEGREE ASSAULT – PATTERN JURY INSTRUCTIONS

**Facts**:

Appellant hit Wayne Vendemia, causing him to fall down and strike his head on the road. Vendemia later died of his injuries. Appellant claimed that she hit Vendemia when he inadvertently spit on her during a heated argument. Appellant was charged with second degree murder and tried before a jury in the Circuit Court for Baltimore City. At the close of the State's case-in-chief, the trial court granted appellant's motion for judgment of acquittal on the second degree murder charge, and the case proceeded on the lesser included crime of unlawful act involuntary manslaughter.

After the close of all the evidence, the trial court instructed the jury on the battery form of second degree assault (MPJI-Cr 4:01C), which was the "unlawful act" part of the involuntary manslaughter charge. Over appellant's objection, the court did not include the third part of the instruction, requiring the State to prove "that the contact was [not consented to by (name)] [not legally justified]." Appellant argued that her actions were "legally justified," because they were "consistent with the behavior of a reasonably prudent individual under the same circumstances." The trial court disagreed that appellant's alleged reasonable behavior could be a "legal justification" to second degree assault.

The trial court also gave the pattern jury instruction for unlawful act involuntary manslaughter, without objection from appellant.

**Held**: Affirmed.

The Court of Special Appeals held that the trial judge did not err in declining to instruct the jury on the third part of the instruction on the battery form of second degree assault. The Court noted that the commentary to MPJI-CR 4:01 instructs the trial court to use the third part of the instruction "unless it is clear that there is neither justification nor consent." According to the Court, there was no issue raised regarding consent, nor was there legal justification present. The Court explained that "reasonableness" is not relevant to a determination of criminal liability unless it is rooted in a recognized defense to the offense at issue, such as self-defense, defense of others, or duress. "Reasonableness," standing alone, is not a recognized legal justification for second degree assault.

The Court also observed that appellant's argument that she was provoked was without merit, because a provocation defense serves only to mitigate the presence of malice and cannot absolve an individual of all criminal liability. Because second degree assault is a general intent crime that does not require malice, and has no lesser included offense, any determination that appellant had in fact been provoked would have been superfluous.

Finally, appellant asserted that the pattern jury instruction for unlawful act involuntary manslaughter misstated the law by failing to include a statement that the act resulting in the victim's death must be one that endangers human life. Because she did not object to the instruction at trial, appellant asked the Court to conduct plain error review.

The Court declined to exercise plain error review, noting that trial judges are strongly encouraged to use pattern jury instructions, and that the Court has never found that a trial judge committed plain error by giving, without objection, a pattern jury instruction. Notwithstanding the Court's refusal to engage in plain error review, the Court explained that the pattern jury instruction did not misstate the law. The Court reaffirmed the holding of *Schlossman v. State*, 105 Md. App. 277 (1995), *cert. dismissed as improvidently granted*, 342 Md. 403 (1996), overruled on other grounds by *Bailey v. State*, 355 Md. 287 (1999), in which the Court held that the unlawful act that is *malum in se* did not need to be life endangering to support a conviction for involuntary manslaughter. The Court observed that, to the extent that Maryland appellate cases since *Schlossman* have included the "endangering life" requirement in defining involuntary manslaughter, such inclusion was mere dictum, because those cases did not involve unlawful act involuntary manslaughter.

*Maynard Snead v. State of Maryland*, No. 665, September Term 2014, filed July 30, 2015. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2015/0665s14.pdf

CRIMINAL PROCEDURE – PETITION FOR WRIT OF ACTUAL INNOCENCE – PLEADING REQUIREMENTS

**Facts**:

In 2000, a jury in the Circuit Court for Baltimore City convicted Maynard Snead of various offenses related to a December 1998 shooting. His conviction rested in part on an eyewitness identification from one of the victims.

In 2014, Snead filed a pro se petition for writ of actual innocence. He alleged that, during discovery in an unrelated case "long after" that case was adjudicated, the State disclosed police reports documenting that the victim told a detective that he had recognized the shooter on a particular street corner in February 1999. Snead further asserted that he was incarcerated at that time, and thus that he could prove that the victim in February 1999 identified someone other than Snead as the shooter. Snead also alleged that the detective gave false testimony at his trial when the detective denied that the victim had ever informed the detective that he had spotted the shooter. Snead claimed that the undisclosed reports constituted newly-discovered evidence that created a substantial or significant possibility that the result of his trial would have been different.

The circuit court dismissed Snead's petition without a hearing. The court relied on this Court's opinion in *Keyes v. State*, 215 Md. App. 660, 673, *cert. denied*, 438 Md. 144 (2014), which affirmed the dismissal of a petition without a hearing where the newly-discovered evidence would have "merely impeached" the testimony of a prosecution witness. Snead appealed.

**Held**: Vacated and remanded.

Pursuant to Maryland Code (2001, 2008 Repl. Vol, 2015 Supp.), § 8-301 of the Criminal Procedure Article ("CP"), a person convicted of a crime in a Maryland circuit court may petition for a writ of actual innocence on the basis of newly discovered evidence that: (1) creates a substantial and significant possibility that the result may have been different; and (2) could not have been discovered in the time period to move for a trial under Maryland Rule 4-331. The court may dismiss a petition without a hearing if the petition fails to assert grounds on which relief may be granted. In assessing whether a petition satisfies the pleading requirement, the court must determine whether the allegations could afford a petitioner relief if those allegations

would be proven at a hearing, after viewing the facts in the light most favorable to the petitioner and accepting all reasonable inferences that can be drawn from the petition.

In *Keyes v. State*, 215 Md. App. 660, 673, *cert. denied*, 438 Md. 144 (2014), this Court affirmed the dismissal of an actual innocence petition on the grounds that the evidence described in the petition would have "merely impeached" the testimony of a prosecution witness and thus that the evidence had no direct bearing on the merits of the trial. More recently, in *State v. Hunt and Hardy*, ___ Md. ___, Nos. 72 & 73, Sept. Term 2014, 2015 WL 3777601 (June 18, 2015), the Court of Appeals criticized and substantially undercut the perhaps "overly rigid" distinction used in *Keyes* and in other cases. The Court clarified that, even after a hearing on the merits, a petition for writ of actual innocence is not necessarily doomed because it relies on evidence that may be only impeaching. It follows that a circuit court should not dismiss a petition on that ground, as long as the petition substantially complies in all other respects with the pleading requirements.

In light of the intervening decision in *Hunt*, the circuit court in the instant case was legally incorrect in concluding that Snead's petition failed to describe newly-discovered evidence within the meaning of CP § 8-301. The allegations in Snead's petition, if believed, could have shown that a detective testified falsely at Snead's trial regarding pretrial identifications made by the victim. Moreover, the evidence, if believed, could tend to exculpate Snead by showing that the victim had identified someone other than Snead as the shooter. Viewing the allegations in the light most favorable to Snead and accepting all reasonable inferences from the petition, the petition asserted a basis that the newly discovered evidence created a substantial or significant possibility that the result of his trial may have been different. Because the dismissal of the petition was based solely on the analysis of *Keyes* that has since been superseded by the Court of Appeals, the court's order needed to be vacated.

*State of Maryland v. Zenno Smith, III*, No. 563, September Term 2013, filed May 27, 2015. Opinion by Thieme, J.

http://www.mdcourts.gov/opinions/cosa/2015/0563s13.pdf

NOLLE PROSEQUI – CASE-BY-CASE EVALUATION – PROSECUTOR'S POWER TO ENTER NOT WITHOUT RESTRAINT – OBJECTION BY DEFENSE COUNSEL

**Facts**:

This case arose out of the shooting death of Ronald Gibson. The evidence presented at trial showed that Gibson and Tonyett Fountain were involved in a dispute over a dog. On June 14, 2008, Tonyett, her boyfriend, Zeno Smith, III, and her son, Dominique Fountain, went to Gibson's home to make peace. Smith had a handgun with him and he gave it to Dominique before they all entered Gibson's home. While in Gibson's home, Dominique used the handgun to shoot Gibson. Approximately twenty minutes after leaving Gibson's home, Tonyett and Dominique were stopped by the police. When Dominique exited the vehicle, the handgun he had used to shoot Gibson fell from his lap. A neighbor found Gibson in his home with a shotgun laying across him. The neighbor moved the shotgun in an attempt to make Gibson more comfortable. Gibson told the neighbor the names of the people involved in the shooting.

Zeno Smith, III was charged with a number of crimes including, but not limited to, first and second-degree murder, first-degree burglary, first and second-degree assault, and use of a handgun in the commission of a felony. Throughout the course of the trial, the State proceeded on a theory of first-degree felony murder based on the statutory felony of first-degree burglary. Smith's defense was that all of the parties had gone to Gibson's residence solely for a peaceful encounter and to "mend fences."

At the conclusion of the State's case, and after the trial court's denial of Smith's motion for judgment of acquittal with respect to the burglary and felony murder charges, the State advised the court that it would enter nolle prosequis for the counts charging second-degree felony murder, first-degree assault, second-degree assault, and use of a handgun in the commission of a felony. Trial counsel did not object. Subsequently, the State also entered a nolle prosequi to the charge of accessory after the fact to second-degree murder. Ultimately, Smith was convicted of first-degree felony murder, first-degree burglary, and possession of a handgun after having been convicted of a felony.

Smith sought post-conviction relief on a number of grounds including that defense counsel failed to object to the entry of nolle prosequis on the charges of second-degree murder, first-degree assault, use of a handgun in the commission of a felony or crime of violence, and accessory after the fact to second-degree murder. The post-conviction court found that defense counsel rendered ineffective assistance of counsel by failing to object to the State's entry of nolle prosequis and, thereby, failing to preserve meritorious issues for appeal. The court explained that the only

possible theory of either first or second-degree murder that the State could pursue against Smith was felony murder, which was predicated on first-degree burglary. To establish first-degree burglary, the State was required to prove intent to commit first-degree assault, which was the only crime of violence applicable to the case. The court noted that first-degree assault would have also supported a conviction for second-degree felony murder. The court concluded that if defense counsel had objected to the nolle prosequis, the second-degree felony murder charge might have reached the jury and the verdict might have been different. Following the grant of post-conviction relief, the State filed an application for leave to appeal, which we granted.

**Held**:

Defense counsel was legally entitled to object to the entry of nolle prosequi as to the second-degree felony murder charge. Under the facts of this case, particularly the inter-connected relationship between the first-degree assault, the first-degree burglary, and the second-degree felony murder charges, it is clear that the absence of fairness resulting from the entry of the nolle prosequi infected the entire trial. There is no support in the record for the State's argument that Smith elected to give the jurors the option of an all-or-nothing verdict, or that he pursued a trial strategy of putting before the jury only those counts which the defense deemed most propitious for securing an acquittal.

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*Donald Connor, Jr. v. State of Maryland*, No. 1561, September Term 2012, filed May 27, 2015. Opinion by Sharer, J.

http://www.mdcourts.gov/opinions/cosa/2015/1561s12.pdf

CRIMINAL LAW – SEX OFFENDER REGISTRATION

**Facts**:

Connor was convicted of sex abuse in 1997, and was required to register for ten years as a sex offender upon his release from custody, which occurred on April 25, 1999. On several occasions thereafter, Connor was prosecuted, convicted, and incarcerated for having violated the terms of his registration requirement.

**Held**:

1. The State's effort to enhance Connor's registration requirement beyond the original ten year period, pursuant to subsequent legislation, was a violation of *ex post facto* prohibitions. *del Pino v. State*, 224 Md. App. 44 (2015).

2. Connor was not entitled to credit against the ten year requirement for the periods of incarceration served as a result of his violations. Those periods tolled the ten year requirement, and expanded it by the total number of days served. Case remanded to the Circuit Court for Baltimore City for further proceedings.

*Ira Chase v. State of Maryland*, No. 1394, September Term 2014, filed August 31, 2015. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2015/1394s14.pdf

CRIMINAL PROCEDURE – TERRY STOP

CRIMINAL PROCEDURE – DURATION OF DETENTION

CRIMINAL PROCEDURE – USE OF CANINE SEARCH

CRIMINAL PROCEDURE – SEARCH INCIDENT TO ARREST

CRIMINAL PROCEDURE – SEARCH INCIDENT TO PRIOR ARREST AS PROBABLE CAUSE FOR A SEARCH WARRANT

**Facts**:

On September 10, 2013, Baltimore City Vice/Narcotics detectives Young and Melnyk were on patrol in the Security Boulevard section of Baltimore County, an area known for "illicit narcotic activity." They went to the Days Inn hotel located on Whitehead Court, which Detective Melnyk knew to be in a "high area of drug trafficking." They pulled into the Days Inn parking lot at around 6:45 p.m. and noticed a white Jeep Cherokee backed into a parking spot. The occupant of the Jeep was talking on his cell phone. About two minutes later, a Lexus pulled in and backed adjacent to the Jeep. The driver of the Lexus exited his vehicle and got into the passenger side of the Jeep.

Detective Melnyk testified that based on the individual talking on his cell phone in the Jeep, the driver of the Lexus pulling into the parking lot and getting into the Jeep, their location in a known high drug area, and the fact that neither individual appeared to be utilizing any services of the Days Inn, the detectives believed that there was illegal drug activity or other criminal activity taking place. For that reason, within five minutes after they entered the Days Inn lot, at approximately 6:50 p.m., the two detectives approached the Jeep to investigate and "detained both occupants" based on reasonable articulable suspicion that they were involved in illegal activity.

As the detectives were approaching the vehicle, the driver specifically, as well as the passenger appeared to be moving things around and reaching under the seat. The passenger immediately put his hands in his pocket. At that point, for their own safety, the detectives requested that the individuals exit the Jeep and then put them in handcuffs to make sure they didn't have any weapons. They were told that they were not free to leave. Appellant and the driver of the Lexus, were then patted down and “Mirandized.” The pat down revealed no weapons. The driver of the Lexus stated that he was at the hotel to watch an Orioles game with an individual named "Phil", while Appellant indicated that he was going to meet his cousin at the Maryland Live Casino.

At this point, approximately 6:52 p.m., Detective Melnyk contacted police dispatch to request that a K-9 unit respond to the scene. The K-9 arrived within minutes, and at 7:00 p.m., the dog alerted on the passenger side door of the Jeep. Appellant was then placed under arrest and was searched incident to the arrest. Police recovered some currency and a Days Inn room key, but no drugs were found on his person or in his Jeep.

The driver of the Lexus was also arrested and when he was searched, police recovered fourteen grams of cocaine. He later spoke to police and, in a written statement, confirmed that he was in the parking lot for the sole purpose of obtaining 3.5 grams of cocaine, but appellant gave him 14 grams instead. Once the police confirmed that the room key found on appellant's person was for a room at the Days Inn, they applied for, and obtained, a search warrant for that room. Search of that room yielded one hundred and eight grams of cocaine along with unused sandwich baggies, a digital scale and other indicia that to an expert in the sale of packaging, distribution of street level narcotics would indicate that the items found in a room were possessed with the intent to distribute.

After hearing argument, the court denied appellant's motion to suppress. With the consent of the court and the State, appellant entered a conditional guilty plea to possession of cocaine with intent to distribute pursuant to Maryland Rule 4-242(d). The factual basis for the guilty plea included the observation by undercover Baltimore County police of what they believed to be a hand to hand drug transaction in a high crime, high drug area.

Based on the statement of facts, the court found appellant guilty of possession of cocaine with intent to distribute. On appeal, appellant contends that he was under arrest when he was removed from his vehicle, handcuffed, read his *Miranda* rights, and questioned, prior to the positive alert by the dog. Because his "arrest" was not supported by probable cause it was unlawful, and therefore, everything recovered thereafter is the fruit of the poisonous tree.

**Held**:

The suppression court did not err in its finding that the detectives did not arrest appellant, but rather, had conducted a lawful *Terry*-stop when they handcuffed him, read him his *Miranda* rights, and questioned him. In considering whether a police stop is an arrest or simply a *Terry* stop, the court considers the totality of the circumstances. Under the circumstances of this case including the nature of the area where the stop occurred; the nervous, evasive, and furtive behavior by the subjects of the stop; the detectives' reasonable belief that subjects were armed and dangerous; and the subjects' conflicting accounts of why they were at the location of the stop gave rise to sufficient reasonable suspicion to justify their detention for further investigation.

The scope of that detention was also justified under the circumstances. The overall detention, prior to the alert by the drug dog, lasted approximately ten minutes. The permitted temporal scope of a *Terry*-stop that involves the possibility of drug violations is different than the scope of a regular *Terry*-stop. In such cases, the bringing of a drug-sniffing canine to the scene is in the

direct service of that investigative purpose, and the reasonableness of doing so measured by the diligence of the police in calling for the arrival of the canine. Because the canine alerted to the presence of drugs within ten minutes of the detectives initiating the stop, the detectives' actions were reasonable.

In addition, appellant could be lawfully arrested and searched incident to arrest after the positive alert by the canine. When a properly trained canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless search of the vehicle. Further, after the recovery of a hotel room key, the recovery of narcotics from the driver of the Lexus, and the driver's implication of appellant in narcotics distribution, there was probable cause to issue a warrant for the search of the hotel room for which appellant had a key.

*Mark Peters v. State of Maryland*, No. 1800, September Term 2013, filed August 26, 2015. Opinion by Eyler, Deborah, S., J.

http://www.mdcourts.gov/opinions/cosa/2015/1800s13.pdf

FOURTH AMENDMENT – WARRANTLESS SEARCH OF UNITS IN MULTI-UNIT APARTMENT BUILDINGS – EXIGENT CIRCUMSTANCES – PROBABLE CAUSE TO BELIEVE THE SUBJECT OF THE SEARCH IS PRESENT IN THE PLACE TO BE SEARCHED – INEVITABLE DISCOVERY DOCTRINE – PLAIN VIEW DOCTRINE.

**Facts**:

Two men attacked the victim as he was entering his apartment. The victim knew the first man, named "Ty," but did not know the second man. The second man was armed with two guns and shot the victim. This happened right after the victim's girlfriend had left from visiting with him and while she was in her car in the parking lot in front of his apartment building. She saw two men in black and wearing masks run out of the victim's apartment building and into one of two other apartment buildings in the same complex. After she attempted unsuccessfully to call the victim, she entered his building and found him. The police arrived quickly and, based on information from the victim and his girlfriend, immediately established a "perimeter" around the two other apartment buildings so no one could enter or leave them.

SWAT team officers conducted a systematic search of the apartments in the two buildings. At each apartment, they knocked on the door, demanded entry, and if there was no response opened the door with a battering ram. Occupants were ordered out of the apartments and were held outside in buses. The officers entered and searched all 12 apartments in the first apartment building without finding anyone named "Ty." In the second apartment building, they searched nine apartments without success, and then demanded entry into the tenth apartment (Apartment J). That apartment was occupied by two men named "Ty" and by the appellant. In searching Apartment J, the police knocked off a grate covering a vent next to the shower, revealing something black that looked like a towel inside the vent. Officers removed the black towel-like material from the vent and saw that it was a ski mask in which two guns were wrapped. The police applied for a search warrant for Apartment J, citing the presence of the guns as probable cause. The warrant was issued and the guns and ski mask were seized.

The appellant was charged with attempted murder. His motion to suppress the guns and ski mask from evidence for a Fourth Amendment violation was denied by the circuit court on the basis of exigent circumstances and inevitable discovery. He was convicted of attempted murder.

**Held**: Reversed.

The circuit court erred in denying the motion to suppress. Absent consent or the application of certain recognized exceptions, a warrantless search of a home by a government agent is presumptively unreasonable and therefore in violation of the Fourth Amendment. For the exigent circumstances exception to the warrant requirement to apply, there must be circumstances amounting to exigency *and* the police must have probable cause to believe that the subject of the search committed a crime and is present in the particular place to be searched. In this case, although there was exigency, in that two men who fit the description of the assailants were seen running out of the victim's apartment building and into one of two apartment buildings in the same complex, there was not probable cause to believe that the assailants were present in any particular apartment in those two apartment buildings. Thus, the search of Apartment J violated the Fourth Amendment and was illegal. The evidence did not support a finding of inevitable discovery and, even if the evidence supported a conclusion that the guns and ski mask were in plain view inside Apartment J, the plain view doctrine did not apply because the officers were not legally present in the apartment to begin with.

*Chukuemeka Okoro v. Maryland Department of the Environment*, No. 389, September Term 2014, filed May 28, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/0389s14.pdf

ENVIRONMENTAL LAW – REDUCTION OF LEAD RISK IN HOUSING ACT – WILLFULNESS OF VIOLATIONS – ADDITIONAL TESTIMONY AT REMAND HEARING

**Facts**:

Appellee, the Maryland Department of the Environment ("the Department"), initiated enforcement proceedings against appellant, Chukuemeka Okoro, after discovering violations of the Reduction of Lead Risk in Housing Act ("the Act") in two of Okoro's rental properties in Baltimore City. Okoro was granted a hearing before an Administrative Law Judge ("ALJ"), who found that Okoro had violated the Act, that his violations were willful and had the potential for harm to human safety, and that the Department's penalty of $37,500 was appropriate. Okoro petitioned for judicial review in the Circuit Court for Baltimore City, which reversed and remanded the ALJ's decision with instructions for the parties to argue the appropriate penalties without considering the violations' potential for harm to human safety.

On remand, the ALJ refused to allow Okoro to present additional evidence, and heard argument only on whether Okoro's violations were willful. The ALJ issued a revised decision, finding that Okoro's violations were willful, and assessing a penalty of $25,650. Okoro filed a second petition for judicial review in the circuit court, which affirmed the revised decision.

**Held**: Affirmed.

The Court of Special Appeals held that in the context of an environmental enforcement action, the willfulness of a violation of an order is considered in terms of the extent to which the existence of the violation was known but uncorrected by the violator, and the extent to which the violator exercised reasonable care. The ALJ, however, need not *find* both elements to be present to determine willfulness; he or she simply must *consider* both parts of the "willfulness" definition and make the appropriate findings thereunder.

Here, substantial evidence supported the ALJ's finding that Okoro's violations were willful, because Okoro knew the law and failed to exercise reasonable care to ensure his compliance with the law. The ALJ heard testimony that Okoro was aware of the Act's property registration and certification requirements, because he had complied with these requirements for his other properties. Moreover, the Department had accredited Okoro to perform the work necessary to bring affected properties into compliance. Okoro did not present any explanation for the eight-month and twenty-three month delays in registering the two rental properties in question, and the

seventeen-month delay in bringing the first property into compliance with the certification requirements, other than the delegation of those responsibilities to his property manager. The Court determined that Okoro's delegation to a property manager of the responsibility for compliance with the Act without ensuring such compliance did not constitute the exercise of reasonable care where the lack of compliance continued over a prolonged period of time.

In addition, as for the second property, both Okoro and the Department presented evidence that it needed further work to bring it into compliance with the certification requirements. Okoro testified that he attempted to bring the property into compliance by delegating this task to his property manager, and that he thought—but did not verify with the Department—that the property was in compliance. Okoro testified that he took the inspector at his word that the certificate was filed, and that the inspector was "procrastinating" in filing the property's certificate. Even if Okoro believed that the inspector had taken care of the certification requirements for the second property, Okoro failed to use reasonable care by not following up with the Department to ensure that the property was in compliance with the Act. Given the length of time that passed between when Okoro was put on notice of the property violations and the date of the hearing, when the second property was still not in compliance, Okoro's mere belief that he was in compliance was an insufficient exercise of reasonable care under the Act.

According to the Court, if Okoro's standard of reasonable care was adopted and thus his violations were not willful because he delegated the task of compliance to his property manager, rental property owners could escape any penalty under the Act as long as their property managers never informed them of their noncompliance. Such interpretation would render the statute's enforcement scheme ineffective, because rental property owners, not their managers, are held responsible under the Act for ensuring compliance.

The Court also rejected Okoro's argument that the circuit court erred in failing to reverse the ALJ's decision to exclude his proffered additional testimony at the remand hearing. At the remand hearing, the ALJ was bound by the circuit court's Remand Order, which did not authorize or require new evidence. The ALJ complied with the Remand Order when she refused to allow Okoro to present new evidence at the remand hearing. Because no appeal was taken from the Remand Order, the Court could not reach any issue relating to the proper scope of the Remand Order. Accordingly, the ALJ did not err in excluding the additional testimony offered by Okoro at the remand hearing.

*Stephen Sieglein v. Laura Schmidt*, No. 2616, September Term 2013, filed August 25, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/2616s13.pdf

FAMILY LAW – PATERNITY – CHILD CONCEIVED THROUGH IN VITRO FERTILIZATION

**Facts**:

Appellant Stephen Sieglein ("Father") and Appellee Laura Schmidt ("Mother") were married in a religious ceremony in Havre de Grace, Maryland, on April 12, 2008. Two years later, both parties signed the contracts and documents necessary to participate in an "in vitro" fertilization ("IVF") plan. A child conceived via donated egg and donated sperm was born to the parties.

Shortly after the birth of the child, the parties separated, and Father contested legal parentage, seeking to eschew any rights or obligations regarding the minor child. On October 11, 2012, the Circuit Court for Harford County issued a Memorandum Opinion and Order establishing legal paternity and Father's joint and several responsibility for support of the minor child. Following a temporary order as to child support, visitation, and custody, the circuit court entered a Judgment of Absolute Divorce on June 19, 2013. On February 10, 2014, the circuit court issued an order finding Father to be voluntarily impoverished, ordering the payment of child support and arrearages, and granting Mother's request for injunctive relief in the form of a protective order.

On appeal Father argued that, because the child is not genetically related to Father, he is not a parent and bears no legal responsibility for the child under Maryland law. Father contends that the circuit court erroneously equated artificial insemination with IVF in applying the applicable statute addressing legal parentage.

**Held**: Affirmed.

The Court of Special Appeals first noted that as a threshold matter, the question of paternity raised in this case is governed by the Estates and Trusts Article ("ET") because the child was born during the marriage. ET § 1-206 creates a presumption of "legitimacy" for children born to a married mother which extends to "[a] child conceived by artificial insemination of a married woman with the consent of her husband."

The Court examined the legislative history of ET § 1-206(b), and determined that the General Assembly evinced its intention to acknowledge the role of medically assisted, non-traditional conception of a child in establishing a parent's rights and obligations. The Court of Special Appeals further opined that under Maryland law, within the context of marriage, the precise physical procedure used for conception has no necessary impact on the relationships of the

parties involved. Therefore, the Court interpreted ET § 1-206(b) as also encompassing IVF, and held that a child conceived via artificial insemination or IVF with the consent of the parties and born during a marriage is the legitimate child of the marriage and legal parentage is established as to both spouses.

The Court of Special Appeals held that because Mother and Father, during their marriage, willingly and voluntarily agreed to conceive a child through assisted reproductive services and that volitional action resulted in the birth of a child, ET § 1-206(b) established that both spouses are the legal parents of the minor child.

*Michelle L. Conover v. Brittany D. Conover*, No. 2099, September Term 2013, filed August 26, 2015. Opinion by Zarnoch, J.

Nazarian, J., concurs

http://www.mdcourts.gov/opinions/cosa/2015/2099s13.pdf

FAMILY LAW – CUSTODY AND VISITATION – ACCESS TO CHILD BY NON-BIOLOGICAL, NON-ADOPTIVE SAME-SEX SPOUSE

**Facts**:

Michelle Conover and Brittany Eckel began a long relationship in 2002. Later, they discussed having a child together and agreed that Brittany would be artificially inseminated by an anonymous donor. The child was conceived in 2009. In March of 2010, the District of Columbia, where the parties lived at the time, began to issue marriage licenses to same-sex couples. On April 4, 2010, Brittany gave birth to a son, Jaxon. The birth certificate listed Brittany as Jaxon's mother, but no one was identified as the "father." On September 28, 2010, the parties married in the District of Columbia, and Brittany took Michelle's last name.

In September 2011, the spouses separated. From the date of separation until July 15, 2012, Michelle visited Jaxon and had overnight and weekend access. Subsequently, Brittany prevented Michelle from continuing to visit Jaxon. In the winter of 2013, the parties each filed for divorce, and Michelle requested visitation rights with respect to the child.

On April 30, 2013, the Circuit Court for Washington County held an evidentiary hearing to determine Michelle's standing to seek access to Jaxon. Brittany argued that Michelle did not have parental standing because she was a third party. Michelle responded that, among other things, she met the paternity factors for a "father" set forth in Maryland Code (1974, 2011 Repl. Vol.), Estates & Trusts Article ("ET"), § 1 208(b) and thus, had standing.

In a written opinion, Circuit Judge Daniel P. Dwyer concluded that Michelle lacked parental standing. Michelle conceded that Brittany was a fit parent and that she had not shown exceptional circumstances to justify a right of access to the child. After the divorce decree was issued, Michelle appealed.

**Held**: Affirmed.

On appeal, Michelle challenged the constitutionality of Maryland's paternity and child legitimacy statutes arguing that they discriminated against women and homosexuals. The Court of Special Appeals concluded that the issue was not raised and decided below and declined to address the argument.

The Court went on to note that the basic inquiry in the case was whether reading the paternity statute to confer parental standing over the objection of a fit biological mother without the showing of exceptional circumstances would be consistent with a biological mother's due process liberty interest: Michelle contended that if it was in the child's best interest, she wins access rights to Jaxon merely upon acknowledging herself in writing to be the parent, or openly and notoriously recognizing Jaxon as her child or because after the child's birth, she married Brittany and has acknowledged herself, orally and in writing, to be the parent. Under Maryland case law, none of these factors, either individually or collectively, would amount to "exceptional circumstances" justifying child access.

The Court noted that in *Monroe v. Monroe*, 329 Md. 758 (1993), a step-father, who met three of the four criteria for paternity under ET § 1-208(b), still had to show exceptional circumstances to demonstrate parental standing. Thus, the Court held that a step-parent and same-sex parent share the same disadvantage, if he or she is not a biological or adoptive parent.

The Court also held that:

1) Because the couple could have married before the child was born, the circuit court did not err in not according weight to the fact that at one time, same-sex marriage was prohibited;
2) The best interest of the child did not have to be considered unless Michelle could establish parental standing;
3) Brittany was not barred by equitable estoppel from denying that Michelle was the parent of Jaxon;
4) Michelle was not mislead to her detriment, even if the biological mother represented that her spouse was a parent or "the father" and the birth mother "handled" the birth certificate that listed no father;
5) The non-biological, non-adoptive spouse was not misled into delaying adoption when she had ample time – years, in fact – to pursue the adoption of the child; and
6) The circuit court did not err when it reached the issue of exceptional circumstances when Michelle placed the issue before the court and claimed that the record "screamed extraordinary circumstances."

*Griffith Energy Service, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA, et al.*, No. 923, September Term, 2013, filed August 25, 2015. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2015/0923s13.pdf

INSURANCE COVERAGE – POLICY INTERPRETATION – MIS-DELIVERY OF HOME HEATING OIL CAUSING DAMAGE TO MORE THAN ONE PROPERTY – ACCIDENT AND OCCURRENCE AS CONTINUOUS AND REPEATED EXPOSURE TO SAME CONDITIONS CAUSING PROPERTY DAMAGE OR HARMFUL CONDITIONS – TIMING OF ACCIDENT AND PROPERTY DAMAGE.

**Facts**:

Fuel truck delivery driver for home heating oil company mistakenly went to the wrong address and pumped over 300 gallons of oil into an exterior receptacle of a house that no longer had a fuel tank. When a tenant ran outside and told the driver that oil was pouring into the basement, the driver realized he was at the wrong address and turned off the pump.

The house was the middle home in a triplex – three attached houses sharing a single roof. The fire department immediately condemned the house into which the oil was pumped and turned off the utilities to all three houses due to the risk of explosion. When the owner of one of the attached houses arrived home, he found oil in his sump. The next day, all three houses were declared uninhabitable by an environmental engineering firm hired by the oil company. Much of the oil had gone down the basement drain in the house to which it was mis-delivered. Oil was found beneath the basement slabs of the three houses. The houses all were condemned. Eventually the oil company was able to remediate and restore the houses.

Under its auto liability policy, the oil company had $1 million in coverage for sums it became obligated to pay for property damage caused by an accident resulting from the use of a covered auto (including the fuel truck). The policy defined an "accident" to include continuous or repeated exposure to the same conditions resulting in property damage. The policy had a completed operations exclusion, and also an exclusion (by endorsement) for property damage caused by the wrong delivery of liquid products if the property damage occurred after delivery was completed.

Under its CGL policy, the oil company had $2 million in coverage for sums it became obligated to pay for property damage caused by an occurrence, which is defined as an accident, including continuous or repeated exposure to the same general harmful conditions. The CGL policy excluded coverage for property damage arising out of the use of an auto owned or operated by the insured, but, by an endorsement, modified that exclusion for mis-delivery of liquid products when the property damage occurred after operations were completed.

The auto policy carrier agreed that there was coverage under its policy. The CGL carrier denied coverage. The auto policy limits then were exhausted. After an excess insurer took the position that its coverage was not triggered until the limits of the auto policy and the limits of the CGL policy were exhausted, the oil company brought a declaratory judgment action against the auto and CGL insurers. It asserted that the property damage to the middle unit, to which the oil was mis-delivered, was covered by the auto policy, because that damage happened while the driver was pumping the oil and therefore before delivery was completed; and the property damage to the two attached units in the triplex was covered by the CGL policy, because that property damage happened after the driver had stopped pumping the oil and therefore after the operations that involved the use of a covered auto were completed. The circuit court disagreed, ruling on cross-motions for summary judgment that the auto policy provided coverage for the property damage to the three houses in the triplex and the CGL policy did not provide any coverage.

**Held**: Judgment affirmed, with remand to supplement with written opinion.

The definition of accident in both policies is expansive, including the continuous or repeated exposure to the same conditions resulting in property damage/harmful conditions. This language refers to the cause of the losses and injuries. Here, there was a single accident–the mis-delivery of home heating oil to the wrong house, which did not have a fuel tank–and that accident caused that house and the two attached houses to be exposed to oil and therefore to suffer property damage. The property damage to all three houses commenced during the mis-delivery, although its full extent did not manifest itself until after the driver stopped mis-delivering the oil.

*Tracey L. Adkins v. Peninsula Regional Medical Center*, No. 712, September Term 2014, filed July 30, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/0712s14.pdf

LABOR AND EMPLOYMENT – MARYLAND FAIR EMPLOYMENT PRACTICES ACT – DISABILITY DISCRIMINATION

**Facts**:

In 2011, Appellant Tracey L. Adkins learned that she needed surgery to remedy a tear and hip deformation in her left hip. At the time, Ms. Adkins was employed by Appellee Peninsula Regional Medical Center ("PRMC") as a storekeeper. Following her surgery, Ms. Adkins could no longer perform the largely physical tasks of the storekeeper position because her surgeon placed her on a sedentary work restriction. After Ms. Adkins took 12 weeks leave under the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 et seq., PRMC granted her 14 weeks of additional FMLA leave, but advised her to begin applying for other positions. Meanwhile, PRMC filled Ms. Adkins's storekeeper position, and Ms. Adkins began applying to numerous vacant positions at PRMC. She was rejected from each one.

In February 2012, following expiration of her extended leave, PRMC terminated Ms. Adkins's employment. PRMC also rejected Ms. Adkins from the positions to which she applied following termination. Ms. Adkins filed a lawsuit against PRMC in February 2013 in the Circuit Court for Wicomico County, alleging disability discrimination and failure to accommodate under Maryland Fair Employment Practices Act ("MFEPA"). The case did not proceed to trial, however, because the circuit court granted PRMC's motion for summary judgment based on its conclusion that although Ms. Adkins had a disability within the meaning of the MFEPA, she was not otherwise qualified for any of the vacant positions to which she applied and did not request an accommodation from PRMC. This Appeal ensued.

**Held**: Reversed in part, affirmed in part.

The Court of Special Appeals began by reviewing the development of federal and Maryland legislation banning disability discrimination in the workplace. The Court then turned to Ms. Adkins's two claims that were disputed on appeal: (1) failure to accommodate, and (2) disability discrimination based on actual disability. The Court highlighted that both causes of action require the employee to be a "qualified individual with a disability." The Court clarified that although Ms. Adkins could no longer perform the essential functions of the storekeeper position, she could still be a "qualified individual with a disability" if she could satisfy her burden of demonstrating that she could perform the essential functions of the vacant positions at PRMC to

which she applied and could have been reassigned as a reasonable accommodation. The Court then turned to determine whether she satisfied this burden.

For the failure-to-accommodate claim, the Court set forth the elements of an employee's prima facie case: (1) that he or she was an individual with a disability; (2) that the employer had notice of his or her disability; (3) that with reasonable accommodation, he or she could perform the essential functions of the position (in other words, that he or she was a "qualified individual with a disability"); and (4) the employer failed or refused to make such accommodations. The Court explained an employee must provide "adequate" notice to the employer of his or her disability and need for an accommodation, and that "magic words" are not required; however, the totality of the circumstances must be considered. Based on the evidence in the record, the Court concluded that there was a genuine dispute of material fact whether Ms. Adkins provided adequate notice to PRMC.

Next, the Court addressed Ms. Adkins's argument that PRMC was required to engage in an "interactive process" with her to determine an appropriate accommodation. The Court concluded that the "interactive process" is a feature of federal law, not Maryland law; however, the Court read COMAR § 14.03.02.04(B)(3) to provide a requirement similar to the interactive process. This provision, the Court explained, requires an individualized assessment by the employer of the employee's abilities to perform the essential functions of a job. When viewed in the light most favorable to Ms. Adkins, the Court concluded that the record generated a genuine dispute of material fact regarding whether PRMC conducted an individualized assessment of Ms. Adkins.

The Court then considered whether Ms. Adkins satisfied her burden of identifying a vacant position at PRMC for which she was qualified. The Court concluded that although Ms. Adkins was not qualified for the core technician position, as she could not perform that job's essential function of lifting, there was a genuine dispute of material fact regarding what the essential functions of the inventory control coordinator position were and whether Ms. Adkins could perform those functions with or without a reasonable accommodation.

Finally, the Court addressed the circuit court's denial of Ms. Adkins's motion to compel. The Court concluded that the denial should be affirmed as to the production of the personnel files of the other core technicians, as those documents were not relevant, but that the denial should be reversed as to the production of vacancies at PRMC during the relevant time period. These vacancies, the Court explained, were important to Ms. Adkins's burden of demonstrating her prima facie case for the failure-to-accommodate claim, as she was required to identify a vacant position for which she was qualified and to which she could have been reassigned.

*Columbia Gas of Maryland, Inc. v. Public Service Commission of Maryland, et al.*, No. 835, September Term 2014, filed August 28, 2015. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2015/0835s14.pdf

PUBLIC UTILITIES – REVIEW AND DETERMINATION IN GENERAL

PUBLIC UTILITIES – DETERMINATION OF RATES

**Facts**:

Appellant, Columbia Gas of Maryland, Inc., is a gas and public service company that provides its customers with natural gas through a pipeline distribution network in Western Maryland. Appellees are the Maryland Public Service Commission ("the Commission") and the Office of the People's Counsel. In 1968, appellant purchased a 2.6 acre parcel of land, the entire parcel consisted of 7.1 acres, and began its operations as a service center. Employees ran the Company's main hub of gas distribution operations and maintenance activity to serve natural gas to customers at the service center. In 2013, appellant purchased the remaining 4.5 acres known as the Cassidy Property.

On February 27, 2013, appellant filed an application with the Commission, requesting an increase in its rates and charges in order to cover anticipated remediation costs regarding the two properties, including the Cassidy Property.

Evidentiary hearings were held at the Commission's offices from June 18 until June 20, 2013. On August 9, 2013, the Chief Public Utility Law Judge Division issued a proposed order which denied appellant the right to recover from its ratepayers, costs incurred from the purchase and environmental remediation of the Cassidy Property.

Appellant appealed to the Commission. On September 23, 2013, the Commission denied appellant's appeal relative to the Cassidy Property, but allowed the recovery costs for the other parcel.

On October 23, 2013, appellant filed a petition for judicial review in the Circuit Court for Washington County. Thereafter, the court issued a memorandum and order affirming the Commission's decision.

**Held**: Affirmed.

The Court of Special Appeals held that appellant failed to demonstrate the nexus between the remediation costs associated with the Cassidy Property and the service today's customers received from it to be considered used and useful for ratemaking purposes, as reflected in Md.

Code (1998 Repl. Vol. 2010), § 4-101 of the Public Utilities Article. Additionally, appellant failed to demonstrate that a refusal to permit a utility company from recovering remediation costs in rate base constituted an unlawful taking without just compensation.

*Cynthia Lorraine Anderson v. Laura H.G. O'Sullivan, et al., Substitute Trustees*, No. 654, September Term 2014, filed August 27, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/0654s14.pdf

FORECLOSURE – REDEMPTIONIST MOVEMENT – LEGALLY INVALID

FORECLOSURE – VAPOR MONEY THEORY – LEGALLY INVALID

FORECLOSURE – MOTION TO DISMISS OR STAY – CONTENTS

FORECLOSURE – MOTION TO DISMISS OR STAY – TIMELINESS

**Facts**:

Cynthia Lorraine Anderson borrowed $501,383.00 from JPMorgan Chase Bank to finance the purchase of a home in Bowie, Maryland on November 28, 2008. At the beginning of August 2009, Ms. Anderson defaulted on the loan. JPMorgan entered the default, and Ms. Anderson immediately began contesting the default by requesting extensive access to JPMorgan's records. JPMorgan did not provide Ms. Anderson access to the requested records, and sent her a Notice of Intent to Foreclose on September 16, 2013. Ms. Anderson filed a bevy of motions in the circuit court, including a request for a hearing, a Motion to Dismiss, and a Motion to Stay. The circuit court denied her Motion to Stay on the basis that she failed to state a valid defense or present meritorious argument, file timely, state a factual or legal basis, or provide supporting documents. Ms. Anderson appealed, presenting a lengthy list of questions generally alleging that the Substitute Trustees appointed by JPMorgan, including Laura H.G. O'Sullivan, inappropriately foreclosed on the home.

**Held**: Affirmed.

The Court of Special Appeals affirmed the circuit court's denial of Ms. Anderson's Motion to Stay, finding that the record supported the circuit court's conclusion that the motion failed to state a valid defense or meritorious argument, was untimely, and lacked supporting documents. *First*, the Court held that Ms. Anderson's legal arguments, which appeared to be based on the Redemptionist Movement and the Vapor Money Theory, had no basis in law, and declined to find that either theory presented a meritorious argument against foreclosure. Ms. Anderson's attempt to use UCC filing statements to separate her person from her "strawman" does not absolve her of her loan obligations. "Cynthia Lorraine Anderson" and "CYNTHIA LORRAINE ANDERSON" do not constitute two separate persons with differing legal obligations. Moreover, her contention that JPMorgan created money "out of thin air" by using her own promissory note to finance her mortgage loan, thereby making the loan invalid *ab initio*, was not accepted by the Court as a valid legal argument. Although prior to this decision no Maryland court had opined on

either theory in a published case, Maryland now joins many other states and federal jurisdictions, as well as several government agencies, in condemning these theories as legally invalid.

*Second*, the Court agreed that the Substitute Trustees and JPMorgan had standing to foreclose. JPMorgan was named as the lender and holder of the Note, and adequately followed the provisions in the Deed of Trust to legally transfer the Note, and its corresponding obligations, to Ms. O'Sullivan and the Substitute Trustees. Furthermore, the Substitute Trustees and JPMorgan met their burden of production under Md. Rule 14-207 to produce documents proving their legal right to foreclose and indicating that all appropriate documentation had been submitted to Ms. Anderson.

*Third*, Ms. Anderson both failed to state her defenses with the particularity required under Md. Rule 14-211(a)(3) and failed to meet the time requirement under 14-211(a)(2). Under Rule 14-211(a)(3)(C), defenses must be both articulated and documented, and none of Ms. Anderson's filings sufficiently did either; none of the numerous letters she sent to either JPMorgan or the circuit court stated any valid legal arguments. In addition, her Motion to Dismiss and Motion to Stay were submitted two months after the Substitute Trustees's Final Loss Mitigation Affidavit was filed, much later than the 15 days allowed by Rule 14-211(a)(2). Ms. Anderson further failed to provide a reason for the filing delay, as required under Rule 14-211(a)(3)(F), and the Court refused to invent one.

# ATTORNEY DISCIPLINE

*

By an Opinion and Order of the Court of Appeals dated August 6, 2015, the following non-admitted attorney is excluded from exercising the privilege of practicing law in this State:

TAWANA SHEPHARD

*

By an Order of the Court of Appeals dated August 10, 2015, the following attorney has been disbarred by consent:

LLOYD FAULKNER SCOTT

*

By an Order of the Court of Appeals dated August 13, 2015, the following attorney has been suspended:

MARK R. GALBRAITH

*

By an Order of the Court of Appeals dated August 14, 2015, the following attorney has been indefinitely suspended by consent:

MARIA REBECCA FLYNN

*

By an Order of the Court of Appeals dated August 20, 2015, the following attorney has been indefinitely suspended:

KRISTAN L. PETERS-HAMLIN

*

By an Order of the Court of Appeals dated August 21, 2015, the following attorney has been disbarred by consent:

KATHRYN ANNE LANGE

*

# UNREPORTED OPINIONS

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